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In the Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the procedures by which petitioner, an insanity acquittee, was committed to a mental hospital in the District of Columbia deprived him of liberty without due process of law.

2. Whether petitioner's commitment violated principles of equal protection implicit in the Fifth Amendment Due Process Clause because the procedures employed differed in certain respects from those applicable to civil commitment of persons who have not been acquitted of a crime by reason of insanity.

3. Whether, assuming the procedures by which petitioner was committed were otherwise constitutionally adequate, he must nonetheless be released upon the expiration of the maximum sentence he could have received if he had been convicted on the criminal charge, unless he is recommitted in a new civil commitment proceeding.

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Note, *Commitment Following an Insanity Acquittal*, 94 Harv. L. Rev. 605 (1981) 41
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OPINIONS BELOW

The original opinion of the panel (J.A. 8-22) and the opinion of the panel upon rehearing (J.A. 23-35) are reported at 396 A.2d 183 and 411 A.2d 624, respectively. The opinion of the en banc court of appeals (J.A. 36-67) is reported at 432 A.2d 364.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 29, 1981. The petition for a writ of certiorari was filed on August 6, 1981, and was granted on January 11, 1982 (J.A. 68). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

Pertinent portions of the D.C. Code are reproduced in the appendix to this brief.

STATEMENT

A. The Statutory Scheme and its Development

1. *Commitment of Insanity Acquittees*

Prior to 1955, the District of Columbia statutes did not require commitment of persons acquitted of a criminal charge by reason of insanity. See D.C. Code Ann. § 24-301 (1951);[1] *Lynch* v *Overholser*, 369 U.S. 705, 715-716 & n.9 (1962). A significant change was made in 1955 in response to the decision in *Durham* v. *United States*, 214 F.2d 862 (D.C. Cir. 1954), which announced a departure from the M'Naughten Rule formulation of the insanity defense. Congress believed that the *Durham* rule would significantly expand the availability of the insanity defense and, absent remedial legislation, make possible the release into the community of dangerously insane individuals. See *Lynch* v. *Overholser*, *supra*, 369 U.S. at 715-717; *Ragsdale* v. *Overholser*, 281 F.2d 943, 947 (D.C. Cir. 1960). Accordingly, Section 301 was amended to provide (D.C. Code Ann. § 24-301(d) (1961)):

> If any person tried upon an indictment or information for an offense * * * is acquitted solely on the ground that he was insane at the

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[1] The statute provided for a special form of insanity acquittal verdict and prescribed that, in the event of an insanity acquittal,

> the court *may* certify the fact to the Federal Security Administrator, who *may* order such person to be confined in the hospital for the insane. [Emphasis added.]

time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.[2]

In the District of Columbia at that time, and until 1970, the prosecution bore the burden of establishing the defendant's sanity at the time of the crime beyond a reasonable doubt—the standard generally applicable to federal prosecutions. *Davis* v *United States*, 160 U.S. 469 (1895); see *Leland* v. *Oregon*, 343 U.S. 790, 797 (1952). Two judicial decisions concerning the application of Section 301 under the prevailing insanity defense caused Congress again to revise the statute in 1970, as part of the District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, 84 Stat. 473 *et seq.* First, in *Lynch* v. *Overholser*, *supra*, this Court interpreted Section 301(d) to apply only to persons who affirmatively avail themselves of the insanity defense. That holding was codified in 1970, by limiting application of Section 301(d) to a person who "raises the defense of insanity." D.C. Code Ann. § 24-301(d) (1973).

More importantly, Congress responded to the decision of the District of Columbia Circuit in *Bolton* v. *Harris*, 395 F.2d 642 (1968), which had engrafted onto the statute a requirement that, following commitment for a reasonable period necessary to determine an insanity acquittee's present mental condition,

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[2] An acquittal premised solely on the ground that the defendant was insane at the time of the offense was to be described as such in the jury's verdict. D.C. Code Ann. § 24-301(c) (1961). Provision was also made for conditional or unconditional release upon an appropriate recommendation of the superintendent of the hospital to which the defendant was committed, subject to judicial review, and for habeas corpus review of continued commitment upon the committee's application. D.C. Code Ann. § 24-301(e), (g) (1961).

"persons found not guilty by reason of insanity * * * be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings." 395 F.2d at 651. The *Bolton* court interpolated the hearing requirement into Section 301(d), branding the statutory procedure otherwise to be "constitutionally suspect" because an insanity acquittal "reflects only a reasonable doubt that the defendant was sane at the time of the offense." 395 F.2d at 648, 650. The court directed that in future cases insanity acquittees be provided "[w]here feasible [with] * * * notice, counsel, jury trial, etc." (395 F.2d at 651 n.50) and that at the commitment hearing the government bear the burden of establishing by a preponderance of the evidence that the insanity acquittee is at that time mentally ill and dangerous. *Id.* at 651-653.

Congress reacted to the *Bolton* decision with consternation (H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 74 (1970)):

> This ruling permits dangerous criminals, particularly psychopaths, to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity and then to escape hospital commitment because the government is unable to prove their insanity following acquittal by a preponderance of the evidence. The result is a revolving door which, as now Chief Justice Burger explained in rejecting such an outcome in *Overholser* v. *O'Beirne* [302 F.2d 852, 861 (1961)], allows defendants "to have it both ways"—to escape both conviction and commitment to a hospital.
>
> The Committee considers this result intolerable. It neither protects the public safety nor provides treatment for a defendant acquitted of a crime on grounds of insanity.

In order to eliminate the constitutional infirmity perceived by the District of Columbia Circuit, without sacrificing the objectives of the 1955 amendment to Section 301, Congress provided that no criminal defendant in the District of Columbia may be acquitted by reason of insanity unless he affirmatively pleads, and establishes by a preponderance of the evidence, his insanity. D.C. Code Ann. § 24-301(j) (1973).[3] Moreover, to insure that continued hospitalization would not rest entirely upon a determination of *past* insanity, Congress directed that, following an initial commitment for evaluation, a hearing be held within 50 days, at which the acquittee, represented by counsel, may establish his eligibility for release by proving that he is no longer dangerously mentally ill. D.C. Code Ann. § 24-301(d)(1), (2) (1973).[4] Congress did not adopt all of the procedures specified in *Bolton*,

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[3] The constitutionality of Section 301(j) has been upheld by both the District of Columbia Court of Appeals and the District of Columbia Circuit. *Bethea* v. *United States*, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977); *United States* v. *Greene*, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977 (1974). Indeed, a higher burden of proof of insanity could be placed upon defendants, consistent with due process. *Leland* v. *Oregon*, *supra*; *Rivera* v. *Delaware*, 429 U.S. 877 (1976) (dismissal for want of a substantial federal question); see *Patterson* v. *New York*, 432 U.S. 197, 205 (1977).

[4] Actually, Section 301(d) does not explicitly prescribe the criteria for commitment (as distinguished from the governing procedure). However, pointing to the release criterion established by Section 301(e), the District of Columbia Court of Appeals in this case interpreted Section 301(d) to require a showing "identical" to that required for other civil commitments under D.C. Code Ann. § 21-545(b) (1973), which the court described as a "twofold proof requirement of mental illness and dangerousness" (J.A. 46-48 & n.16).

however. Rather than prescribing complete conformity with procedures for regular civil commitments, Congresss provided that in the 50-day hearing the burden of proof would rest upon the acquittee to show lack of mental illness or dangerousness, and it did not provide for jury determination of the issues at that hearing. See H.R. Rep. No. 1303, 91st Cong., 2d Sess. 233 (1970). These commitment procedures are the ones applied to petitioner and remain in effect today.[5]

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[5] The language of Section 301 suggests that the provision applies to D.C. Code offenses whether tried in the United States District Court for the District of Columbia or the D.C. Superior Court (see *United States* v. *Greene*, *supra*, 489 F.2d at 1153), and to United States Code offenses tried in the district court. See D.C. Code Ann. § 24-301(h) (1973). The question whether Section 301(d) may, consistently with equal protection principles, be applied to persons charged with United States Code offenses, in addition to those, such as petitioner, charged with violation of the D.C. Code, is presently pending before the en banc District of Columbia Circuit in *United States* v. *Cohen*, No. 81-1036 (rehearing en banc granted, May 4, 1982). A divided panel of that court had held that Congress intended Section 301(d) to apply to acquittals on federal charges but that it is unconstitutional as so applied. *United States* v. *Cohen*, No. 81-1036 (Mar. 5, 1982). That decision was vacated by the full court upon granting rehearing en banc. The panel had declined to intimate any view as to the questions presented in this case. Slip op. 2.

We are advised that because the District of Columbia Circuit has expressed doubt as to the constitutionality of applying Section 301(j), the affirmative insanity defense, in prosecutions for United States Code offenses, it is the practice of the judges of the United States District Court for the District of Columbia to place upon the prosecution the burden of proving a defendant's sanity beyond a reasonable doubt in such cases. See, *e.g.*, *United States* v. *Whitlock*, 663 F.2d 1094, 1104 & n.76 (1980). Indeed, in *United States* v. *John W. Hinckley, Jr.*, Crim. No. 81-306 (Jury Judgment of June 21,

A committed insanity acquittee may secure release pursuant to any one of three procedural routes.[6] First, under D.C. Code Ann. § 24-301(e) (1973), a person is entitled to unconditional release upon certification by the superintendent of the hospital that the individual has recovered his sanity and will not be dangerous to himself or others. If the prosecuting authority objects to release upon such a certification, however, the court must hold an evidentiary hearing to determine whether "such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others."[7] The statutory standard has been construed to require that there "be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community, in the reasonably foreseeable future." *Overholser* v. *Leach*, 257 F.2d 667, 670 (D.C. Cir. 1958) (footnotes omitted), cert. denied, 359 U.S. 1013 (1959), overruled in other respects, *Bolton* v. *Harris*, *supra*, 395 F.2d at 653; see *United States* v. *Brawner*, 471 F.2d 969, 1009-1010 (D.C. Cir. 1972) (en banc).[8] Provi-

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1982), the jury was instructed that the burden of proving sanity beyond a reasonable doubt rested upon the prosecution as to both the D.C. Code offenses and the federal offenses there charged.

[6] Like other civil committees, a committed insanity acquittee enjoys a statutory right to treatment. See D.C. Code Ann. § 21-562 (1973); *Tribby* v. *Cameron*, 379 F.2d 104 (D.C. Cir. 1967); *Rouse* v. *Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

[7] The court may elect to hold such a hearing *sua sponte* as well, upon receipt of a release certification.

[8] Thus, notwithstanding the language of Section 301(e), the statute has been interpreted to allow release upon a showing of either an absence of dangerousness or a remission of mental illness. The D.C. Court of Appeals made clear in the

sion is also made for conditional release upon certification by the superintendent, subject to judicial review as described above, that the patient's recovery has advanced to the point that the conditions prescribed suffice to assure that the patient "will not in the reasonable future be dangerous to himself or others" (*Hough* v. *United States*, 271 F.2d 458, 461 (D.C. Cir. 1959); see also *United States* v. *Ecker*, 543 F.2d 178, 184, 194-199 (D.C. Cir. 1976), cert. denied, 429 U.S. 1063 (1977)).

In addition, Section 301(k) provides a committed individual the right to initiate a judicial proceeding to determine his right to release. Finally, Section 301(g) also provides for release upon writ of habeas corpus. Under either of these procedures initiated by a committed acquittee, as in the 50-day hearing, the burden of proving eligibility for release, by a preponderance of the evidence, is placed upon the patient. D.C. Code Ann. § 24-301(k) (1973); *Bolton* v. *Harris*, *supra*, 395 F.2d at 653. The assignment of the burden of proof when the hospital has recommended release is less clearly established. See *United States* v. *Ecker*, *supra*, 543 F.2d at 191-194 (Wilkey, J.); *id.* at 200-201 (Lumbard, J., concurring); *id.* at 202-203 & nn.5 & 6 (Wright, J., dissenting).[9]

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decision below that it approves that interpretation of the release standard (see J.A. 47-48 & n.16), and that to avoid commitment after the 50-day hearing under Section 301 (d)(2) it suffices that the acquittee make either showing. See pages 8-9 note 9, *infra*.

[9] Decisions of the District of Columbia Circuit regarding the precise standard for release are in some disarray. In *Dixon* v. *Jacobs*, 427 F.2d 589, 595 (1970), the court stated, in what may be dictum, that a committed insanity acquittee, like any other civil committee, is to be released if no longer mentally ill, or even if still mentally ill, if he is no longer

2. Procedures for civil commitment of other persons

The procedures governing involuntary civil commitment in the District of Columbia of persons other than insanity acquittees are contained in D.C. Code Ann. § 21-541 *et seq.* (1973).[10] Civil commitment proceedings may be initiated by a relative, guardian, police officer, physician, or, most commonly, by the Superintendent of St. Elizabeths Hospital, which serves as the public mental hospital for the District of Columbia. A petition for commitment must be filed with the Commission on Mental Health and is served upon the subject of the petition. D.C. Code Ann. § 21-541 (1973). The Commission is required to hold a hearing, at which the respondent is entitled to be represented by counsel. D.C. Code Ann. §§ 21-542, 21-543

"likely to injure himself or other persons." However, Judge Leventhal, concurring, suggested that a somewhat lesser likelihood of future dangerousness would suffice to continue commitment of an insanity acquittee. 427 F.2d at 601-603. In *United States* v. *Ecker*, *supra*, 543 F.2d at 194-199, a different panel, again divided, suggested a somewhat different release standard to be applied to committed insanity acquittees, at least under Section 301(e). Insofar as these decisions suggest that the standard for commitment under Section 301(d) differs from that applied in civil commitments, they reflect an interpretation of D.C. Code Ann. § 24-301(d) (1973) that is superseded by the en banc District of Columbia Court of Appeals' conclusion (see page 5 note 4, *supra*) that the commitment standard is "identical" to the civil commitment standard. Similarly, because the court below borrowed the Section 301(d)(2) commitment standard from Section 301(e), the views expressed by the D.C. Circuit in *Ecker* and by Judge Leventhal in *Dixon* as to the release standard for committed insanity acquittees have been substantially undercut.

[10] Separate procedures for temporary emergency commitments are set forth at D.C. Code Ann. § 21-521 *et seq.* (1973).

(1973).[11] The Commission is directed to render findings and conclusions as to whether the respondent is "mentally ill, and because of the illness * * *, likely to injure himself or other persons if allowed to remain at liberty." D.C. Code Ann. § 21-544 (1973). Should the Commission so find, the report is filed with the Superior Court, which must then set the matter for a hearing. The respondent may by timely demand secure a jury trial to determine whether commitment is justified. *Ibid.*; D.C. Code Ann. § 21-545(a) (1973).[12] At the hearing the petitioner must prove by clear and convincing evidence that the respondent is both mentally ill and dangerous to himself or others. D.C. Code Ann. § 21-545(b) (1973); *In re Nelson*, 408 A.2d 1233 (D.C. App. 1979).[13]

Release from civil commitment may be secured by any of several procedures. First, the chief of service of the hospital with custody is required to examine all committees at intervals no greater than every six months and to release those who no longer meet the

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[11] Counsel will be appointed if necessary for indigents or others unable to secure counsel. *In re Barnard*, 455 F.2d 1370, 1375-1376 (D.C. Cir. 1971).

[12] Even if no jury trial is demanded, the court is obliged to review the Commission's report and determine the issues. D.C. Code Ann. § 21-545(a) (1973); see *In re Walls*, 442 F.2d 749 (D.C. Cir. 1971).

[13] Prior to this Court's decision in *Addington* v. *Texas*, 441 U.S. 418 (1979), the required quantum of proof was held to be proof beyond a reasonable doubt. See *In re Hodges*, 325 A.2d 605 (D.C. App. 1974); *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973). Previously, the standard fixed by the courts had been proof by a preponderance of the evidence. *Bolton* v. *Harris*, *supra*, 395 F.2d at 651-653. *In re Nelson*, *supra*, announced the present standard, formulated in light of *Addington*.

statutory standard for commitment. D.C. Code Ann. § 21-548 (1973). If release is not initiated by the hospital, a patient or his representative may, periodically, secure an examination by hospital physicians, and by an independent physician. D.C. Code Ann. § 21-546 (1973). The chief of the hospital service may determine that the committee is to be released upon the basis of their reports. *Ibid.* If he concludes otherwise, but one of the examining physicians dissents from his decision, the patient is authorized to petition the court for release pursuant to D.C. Code Ann. § 21-547 (1973). Finally, a patient may seek release upon a petition for a writ of habeas corpus, by demonstrating that the statutory standard for commitment is no longer satisfied. D.C. Code Ann. § 21-549 (1973). The burden of establishing the right to release, by a preponderance of the evidence, is assigned to the patient. *Bolton* v. *Harris*, *supra*, 395 F.2d at 653.

B. Proceedings in this case

1. Petitioner is a patient at St. Elizabeths Hospital in the District of Columbia, where he has been committed as a dangerously insane individual since March 1976, pursuant to D.C. Code Ann. § 24-301(d) (1973). His commitment resulted from a charge of attempted petit larcency brought against him in September of 1975. Following a pretrial commitment to St. Elizabeths for a court-ordered competency examination,[14] and waiver of his right to a jury trial, petitioner was acquitted by reason of insanity in a

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[14] See D.C. Code Ann. § 24-301(a) (1973). The examining psychologist reported that petitioner was competent to stand trial but had "signs and symptoms of a severe mental disorder, including auditory hallucinations," warranting hospitalization at St. Elizabeths for treatment (J.A. 38-39 n.3).

bench trial upon stipulated facts in the Superior Court of the District of Columbia. The stipulation showed both that he had committed the crime and that the crime resulted from his mental illness. Upon his acquittal, petitioner was initially committed pursuant to D.C. Code Ann. § 24-301(d)(1) (1973) (J.A 36-39). On May 25, 1976, following the statutory "50-day" evidentiary hearing, the court remanded the petitioner for continuing commitment to St. Elizabeths Hospital, finding that petitioner "is mentally ill and as a result of his mental illness, at this time, he constitutes a danger to himself or to others" (May 25, 1976 Tr. 13).[15] However, the court

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[15] In an April 23, 1976, letter to the court, the Superintendent of St. Elizabeths stated that petitioner was suffering from schizophrenia, paranoid type, and was receiving medication. He added that "Mr. Jones is in need of further hospitalization, and by virtue of his mental illness, he would be a danger to himself and to others if released into the community at this time" (J.A. 39 n.5). Although petitioner asserts (Br. 17 n.11) that this "letter in fact had no independent evidentiary significance at petitioner's hearing under Section 301(d)," in actuality it is not clear what weight, if any, the letter was given by the court.

In any event, as petitioner concedes (Br. 2-3, 17 n.11) the only witness at the "50-day" hearing was a clinical psychologist from St. Elizabeths Hospital, Dr. Gertrude Cooper, who was called by the government and testified without contradiction that petitioner was suffering from "schizophrenia, paranoid type"; that petitioner's "illness is still quite active"; and that "he is still a danger to himself and to others" (May 25, 1976 Tr. 9). Petitioner observes (Br. 3 n.1) that the transcript of the 50-day hearing is not in the record considered by the court of appeals. Petitioner has nonetheless cited portions of it liberally and lodged it with the Court.

The excerpts cited by petitioner do not fairly reflect the thrust of the testimony given. First, the transcript reveals that despite the burden of proof placed upon petitioner by

evidently calendared a further hearing for November 29, 1976 (J.A. 9, 39).[16]

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the statute, petitioner called no witnesses, and the government volunteered to proceed first with its expert witness, Dr. Cooper. She had examined petitioner upon his admission to St. Elizabeths and had observed his behavior over an extended period of time. Her testimony established that petitioner was receiving heavy doses of an antipsychotic drug, Thorazine, intended to control his auditory hallucinations and delusional thought processes (May 25, 1976 Tr. 8-10). As stated above, Dr. Cooper concluded that petitioner remained seriously mentally ill and dangerous to himself and others. Petitioner's cross-examination was limited. Dr. Cooper testified (*id.* at 10) that petitioner remained a danger to the community and that he "is still likely to do the same thing again; the attempted larceny." Counsel appeared to concede that petitioner remained mentally ill, dangerous, and in need of treatment. Focusing his examination instead upon the possibility of transfer of petitioner to a different facility within St. Elizabeths, counsel explained (*id.* at 11-12):

> I think the issue here is one of relief. It is not only—it is easy enough to sit here and make a determination as to whether or not Mr. Jones is or is not a danger and the other things, but also the moral issue. Are we going to keep the man with nine hundred milligrams of Thorazine in Saint Elizabeths Hospital? What are we going to do? We have a moral obligation here.
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> * * * * *
>
> Our moral obligation is to try to make a constructive citizen out of this man; try to help him.

On the questions of mental illness and dangerousness, which the court ruled to be the only questions open for decision (*id.* at 11), counsel conceded that "the testimony of the doctor speaks for itself" (*id.* at 12).

[16] The Superior Court's action in scheduling the follow-up hearing may have been prompted by language in *Bolton* v. *Harris*, *supra*, 395 F.2d at 652, directing that persons committed under Section 301(d) be afforded the periodic examinations prescribed for other civil committees under D.C. Code

At the hearing held on November 29, 1976, petitioner asserted that he was entitled to immediate release from the hospital unless civilly committed, because the maximum prison sentence that he could have received had he been convicted of the crime charged (one year's imprisonment) had expired. Petitioner argued that he was denied equal protection of the laws by the failure at that juncture to afford him the procedures applied to persons, other than insanity acquittees, whom the government seeks to commit by civil process.[17] After a further hearing on February 22, 1977, the court denied the requested relief and, reaffirming its findings at the 50-day hearing that petitioner remained mentally ill and danger-

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Ann. § 21-548 (1973) (see pages 10-11, *supra*), and the right to a judicial hearing if any examining physician finds grounds for release, prescribed by D.C. Code Ann. § 21-547 (1973). However, there is no indication in the record that petitioner was found to be releasable upon any such examination, and petitioner's claim that he was entitled to release rested solely upon his legal contentions.

[17] For reasons that are not of record, no attorney appeared for the government on November 29, 1976. Petitioner's motion for release was oral, so the government had no prior notice of petitioner's contentions. The Superior Court entered an order at the hearing directing the government either to initiate civil commitment proceedings or to show cause why the subsisting commitment should not be vacated. The government initially undertook to commence a civil commitment proceeding, and the staff of St. Elizabeths recommended commitment. (We note that a letter dated November 29, 1976, submitted to the Court by the Superintendent of St. Elizabeths Hospital reported that Jones had twice attempted suicide during his hospitalization to that point.) The government ultimately decided to adhere to the statutory scheme by contesting the demand for release. It then persuaded the Superior Court to withdraw its earlier order and instead to direct that petitioner pursue his demand for release by written motion, affording the government an opportunity to respond (J.A. 9-10).

ous, directed petitioner's continued confinement at St. Elizabeths (J.A. 10, 39).[18]

2. Petitioner appealed from this order and renewed his contention that equal protection principles required his release upon the expiration of his hypothetical maximum sentence unless the government invoked the procedures for civil commitment. A panel of the court of appeals initially rejected this argument (J.A. 8-22). The panel granted rehearing, however, and ultimately reversed itself (J.A. 23-35). Rejecting "the view that an acquittee's mental illness and dangerousness at the time of the offense are consistently such powerful evidence of illness and dangerousness later (*i.e.*, at the time of the 'release hearing') that they raise a presumption of continuing insanity in every case," the panel concluded that the differences between criminal and civil commitment procedures cannot be justified on purely evidentiary grounds (J.A. 32-33; citation omitted). The panel

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[18] Petitioner subsequently moved for unconditional release under D.C. Code Ann. § 24-301(k) (1973), but the motion was denied. Three months later, pursuant to D.C. Code Ann. § 24-301(e) (1973), he was granted conditional release on terms, recommended by the St. Elizabeths' staff, that allowed him to make daytime and overnight visits into the community. He was also admitted into the civil division of the hospital at that time, although as a result of disruptive behavior he was later retransferred to the forensic division (J.A. 39 n.6).

Following the decision in his favor by the panel of the court of appeals upon rehearing, petitioner was unconditionally released from St. Elizabeths on March 26, 1980. We are advised, however, that on April 8, 1980, petitioner was recommitted temporarily on an emergency civil basis for conduct unrelated to the prior commitment. On April 22, 1980, the court of appeals granted rehearing en banc, vacating the mandate of the panel. Petitioner was retransferred to the forensic division of the hospital and remains there today.

accordingly reasoned that the purpose of commitment of an insanity acquittee under Section 301(d) is necessarily "partially punitive"; that commitment on these terms justifies the confinement of an acquittee for treatment only until his or her hypothetical maximum sentence has expired (if at all); and that no basis for continued commitment exists thereafter unless the procedure for civil commitment is invoked (J.A. 32-34). The panel accordingly directed release of petitioner unless *de novo* civil commitment proceedings were initiated, leading to a new commitment order (J.A. 34-35).

The en banc court of appeals vacated the panel decision, however, and upheld the trial court's order (J.A. 36-56). The court concluded, first, that "there is no basis for finding § 301(d) punitive in any respect," holding that its purposes are "exclusively remedial and protective" and that a "punitive rationale has no part in the commitment of persons acquitted by reason of insanity" (J.A. 40, 41). The court explained (J.A. 42-44; footnote omitted):

> [P]lain reason compels rejection of [petitioner's] reliance on his hypothetical maximum prison term as artificial and meaningless. Statutory maximum sentences have no relationship to the purposes of mental care and treatment. They are intended rather, to set the outer boundaries of lawful punishment for persons found criminally responsible for specified offenses. * * * Subsection 301(d) commitments are neither expressly nor impliedly related to statutory maximum sentences. To the contrary, § 301(d) contemplates an indeterminate period of confinement and treatment, depending on when the patient has recovered his sanity or no longer poses a danger to himself or others.
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> * * * * *

> [R]eference to either a hypothetical maximum prison sentence, or even to a judically limited commitment term would completely refute the statutory purpose of § 301(d) and would frustrate any attempt at treating and rehabilitating mental patients who happen to have been acquitted of crimes by reason of insanity.

The court then rejected petitioner's contention that his continuing commitment under Section 301(d) denied him equal protection of the laws because it was based on procedures different from those afforded persons who are civilly committed other than insanity acquittees. At the outset the court stressed that the criteria for civil commitment under the two statutory schemes are identical, each requiring proof both of mental illness and dangerousness (J.A. 47-48 & n. 16).[19] Moreover, each procedure provides "the essential due process rights associated with involuntary commitment," including judicial determination of the issues, notice, and assistance of counsel (J.A. 48). The court identified three differences between the statutory commitment schemes: (1) the unavailability of a jury trial at the 50-day hearing under Section 301(d)(2); (2) the shift of the burden of proof to the acquittee under Section 301(d)(2); and (3) the different quantum of proof required for commitment under Section 301(d)(2) (J.A. 49-50).[20] Each fea-

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[19] The court stated that commitment under Section 301(d) is a civil proceeding (J.A. 43 n.10).

[20] The en banc court noted (J.A. 50 n.19) that it had not considered any differences in post-commitment procedures because petitioner's argument did not address such differences.

ture of the criminal commitment process was held to be justified by the exceptional procedural posture of persons who have been acquitted of a criminal offense by reason of insanity (J.A. 49-56).

The court concluded that the unavailability to an acquittee in a 50-day release hearing of the jury trial afforded to potential civil committees is "justified by the fact that the acquittee has had a right to a jury determination of his sanity at the time of the offense" (J.A. 50). The court noted that "the acquittee's mental illness is initially established by affirmative proof," adding that "[d]angerousness is no less validly established by proof that the defendant committed the criminal act, a finding necessarily underlying any acquittal by reason of insanity" (*ibid.*; citations omitted). The court accordingly held that "[t]he fact that [petitioner's present] mental illness and dangerousness are not jury determined, but derived from a prior jury finding, is not significant since the continuation of these attributes is a rational and permissible evidentiary presumption" (J.A. 50-51; footnote omitted).

The court also upheld the assignment of the burden of proof to the acquittee in the 50-day hearing (J.A. 52-53):

> It is entirely rational for the District to require an acquittee to prove his entitlement to release where he was the one to advocate the fact of his past insanity. Automatic § 301(d) commitment does not follow an acquittal by reason of insanity when the question of insanity is raised by the court or the prosecutor, rather than the defendant. *United States* v. *Wright*, 167 U.S. App. D.C. 309, 511 F.2d 1311 (1975). As mentioned

> above, the presumption that a mental condition continues is a reasonable one and it is also reasonable to require the person who raised the presumption to refute it by affirmative proof. Furthermore, whatever difference in risk allocation there might be between the two statutes as a result of who bears the burden of proof is minimized by the fact that when the acquittee bears the burden, he need prove entitlement to release by only a preponderance of the evidence, the lowest standard of proof * * *.

Finally, the court rejected petitioner's contention that the difference between the level of proof required for commitment under the two procedures violates equal protection (J.A. 53; footnote omitted):

> An acquittee's past insanity is proven by a preponderance of the evidence. His present insanity is determined by his failure to rebut, by a preponderance of the evidence, the presumption of continuing insanity. In contrast, a committee's detention is based on clear and convincing evidence of mental illness and dangerousness. *In re Nelson, supra.* The difference between these two standards is justified by the fact that Congress determined that a defendant raising an insanity defense should not have to meet a higher burden on such a relatively difficult issue. However, when the District seeks to commit a person who is disputing the fact of insanity or dangerousness, it is reasonable that the risk of error be more heavily thrust upon the government. See *Addington* v. *Texas* [441 U.S. 418 (1979)].

SUMMARY OF ARGUMENT

I

A. Petitioner was committed based upon the Superior Court's finding, resting on uncontradicted evidence, that he remained mentally ill and dangerous to himself and others at the time of his 50-day hearing. The procedures afforded petitioner at that hearing included notice, a judicial hearing, the assistance of counsel, and an opportunity to be heard and present evidence on the material issues at a meaningful time. Even though the statutory scheme would not have passed constitutional muster for purposes of ordinary civil commitment, it satisfied due process requirements as applied to petitioner.

In *Addington* v. *Texas*, 441 U.S. 418 (1979), this Court held that clear and convincing evidence is the standard of proof to be applied in ordinary civil commitment proceedings. But the Court's decision rested upon careful balancing of the constellation of relevant interests there at stake, rather than upon any fixed rule embodied in the Constitution regulating all involuntary hospitalization of the mentally ill. Unlike other persons subject to civil commitment, under the law applied in the District of Columbia an insanity acquittee [21] has been found beyond a reasonable doubt

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[21] We use the term "insanity acquittee" in this brief as a convenient shorthand way of referring to persons in petitioner's situation. We stress that the special verdict established by Section 301 is "not guilty solely by reason of insanity." See D.C. Code Ann. § 24-301(c) and (d)(1) (1973). Thus, as is reflected in the jury instructions employed in the District of Columbia, see *United States* v. *Brawner*, *supra*, 471 F.2d at 1008-1009, a judgment of not guilty by reason of insanity incorporates a determination of guilt respecting all elements of the offense, including the element of *mens rea*. See

to have committed a criminal act, but has been excused from the criminal sanction because he has successfully established, by a preponderance of the evidence, that the criminal act was the product of legal insanity. These special circumstances, which set an insanity acquittee apart from others to whom civil commitment procedures may be applied, justify the application of a different standard and burden of proof in the commitment of insanity acquittees.

First, the prior findings of insanity and criminal conduct substantially reduce the possibility, which concerned the Court in *Addington* (441 U.S. at 426), that commitment might rest upon conduct that is merely harmlessly idiosyncratic. The inherent uncertainty of predictions about human behavior, which infects all civil commitments, is substantially tempered in the case of the insanity acquittee because the acquittee has acknowledged, and the court or jury has found, that his own mental disease was the cause of criminal conduct. And the available empirical research shows that past unlawful conduct is the single most powerful variable in predicting future conduct of the same kind.

Moreover, the interests of the class of potential insanity acquittees would not be served by a rule that elevates the burden of establishing mental disease or dangerousness for purposes of commitment, because Congress deliberately tied that standard to the burden imposed upon defendants seeking acquittal on insanity grounds. Congress thereby guarded against the anomalous situation wherein an individual avoids

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Rucker v. *United States*, 280 F.2d 623, 625 (D.C. Cir. 1960). Our use of the term "insanity acquittee" should not obscure the fact that such a person has not been acquitted in the conventional sense at all.

both conviction and commitment solely because of discrepancies in the relevant standard or burden of proof. As a result of the linkage effected, however, the liberty interests of defendants in avoiding unwarranted conviction and avoiding unwarranted commitment are in tension. A proper accommodation of the two is reflected in the special commitment procedures applied to insanity acquittees.

We note as well that insanity acquittees lack the stigma-avoidance interests of other persons facing civil commitment, a factor the Court considered significant in *Addington* (441 U.S. at 425-426). At the time of the commitment hearing it is too late for one who has raised the insanity defense to avoid whatever stigma may be associated with antisocial conduct and mental illness.

The foregoing considerations have prompted the legislatures of the states generally to establish procedures for civil commitment of insanity acquittees that differ from those applied to other persons. Congress has done the same for the District of Columbia. Thus, unlike the judge-made Texas procedure condemned in *Addington*, which was virtually unique, the salient features of the commitment procedures for insanity acquittees in the District of Columbia bear the clear imprimatur of social and legislative consensus. This widely shared appreciation of the unique situation of insanity acquittees facing commitment should be given substantial weight by the Court in determining the requirements of due process.

B. Contrary to the contentions of petitioner and the amici, petitioner's commitment does not rest upon an impermissible presumption of continuing insanity and dangerousness flowing from his criminal trial, but upon affirmative findings of fact, rendered at the

commitment hearing, that those conditions remain present. To the extent petitioner's "presumption" argument focuses upon the propriety of selecting a different standard of proof from that ordinarily employed in civil commitment proceedings (*i.e.*, preponderance rather than clear and convincing), it does not further the constitutional analysis, but is instead analytically trivial. Inherent in the selection of any standard of proof is a "presumption" that proof falling short of that standard is insufficient to establish the ultimate fact at issue, while proof exceeding it may conversely be said to be "presumed" to establish the fact. But if the particular standard of proof is a fair and sufficiently reliable one for the purpose at hand to satisfy due process requirements generally, characterizing it as embodying a presumption detracts not at all from its validity.

Insofar as petitioner's "presumption" argument attacks that part of the statutory scheme placing the burden of production and persuasion upon him at the 50-day hearing, the issue is not presented in this case. The uncontradicted testimony of the government's witness was the only evidence presented at petitioner's 50-day hearing, and the court entered affirmative findings, based upon the record at the hearing, that petitioner remained mentally ill to such an extent as to be dangerous to himself and others if released.

In any event, there is no infirmity in the assignment of the burden of proof to an insanity acquittee generally. Contrary to petitioner, this Court's decisions respecting the role of presumptions as to elements of an offense in a criminal case are inapposite because the commitment proceeding is not criminal in nature. Moreover, as the advocate of his own insanity, it is

entirely appropriate that the acquittee bear the burden of providing reasonable assurance that the mental disease that excused his criminal conduct no longer poses an intolerable threat to society. If this is to be considered a presumption of continuing mental illness, it is fully supported by common experience; the reliability of this "presumption" is not called in question by evidence in the record or by the various psychiatric studies and hypotheses relied upon by petitioner and the amici curiae.

II

A. Petitioner and the amici suggest that the differences between the commitment procedures afforded to insanity acquittees and those prescribed for other civil commitments in the District of Columbia should be subjected to "strict scrutiny" equal protection analysis because a liberty interest is implicated. This Court, however, has applied the "rational relationship" analysis in its decisions respecting commitment resting upon mental disability or disease (see *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966); *Jackson* v. *Indiana*, 406 U.S. 715, 729 (1972)), as well as in addressing other classifications that give rise to confinement (see, *e.g.*, *Marshall* v. *United States*, 414 U.S. 417 (1974)).

Strict scrutiny analysis is in any event inappropriate here because, as a consequence of the prior finding of a criminal act produced by mental illness, an insanity acquittee does not possess an unqualified liberty interest. In addition, the conflicting interest of the class of potential insanity acquittees respecting the standard of proof to be used at the criminal trial militates against strict scrutiny. There is simply no basis for holding that defendants possess a funda-

mental interest in being able to avoid conviction by demonstrating insanity by a preponderance of the evidence while simultaneously avoiding commitment although continuing dangerous mental illness is established with a comparable degree of reliability. In any event, there can be no occasion for strict scrutiny of the differing standards of proof applied in the District of Columbia to insanity acquittees and to others who are civilly committed, for Congress has made no such classification. Rather the higher standard of proof applied in ordinary civil commitments is entirely a product of judicial interpretation based upon the requirements of due process as finally determined in *Addington* v. *Texas* for that class of individuals. Accordingly, the special interests that support the procedure established in D.C. Code Section 301(d) as a matter of due process are equally sufficient to meet any challenge resting on elements of equal protection assured by the Fifth Amendment Due Process Clause.

B. The differences between commitment procedures applied to insanity acquittees and those applied in other civil commitment proceedings are directly and logically related to the circumstances that distinguish the two classes. The use of a preponderance of the evidence standard of proof is justified by Congress' decision to make the insanity defense reasonably accessible to mentally ill offenders, and the equally reasonable conclusion that the burden of proof in commitment proceedings should be commensurate with that in the criminal trial. The maintenance of parallelism in the two proceedings is essential to control what Congress considered to be a "revolving door" whereby an individual could avoid criminal responsibility yet be free of civil commitment, even

though the mental condition that produced his unlawful act remained unameliorated.

The omission of a jury trial at the commitment hearing is an appropriate reflection of the acquittee's special situation, for, unlike other committees, he has already had an opportunity for jury determination of his mental status. He also has had an opportunity—not available to civil committees—for a jury determination as to whether he committed the acts that ground the criminal charge. As a protection against the possibility of unwarranted commitment, this finding compares favorably with the unavoidably speculative findings based on predictions of future conduct made in ordinary civil commitment proceedings.

III

For the foregoing reasons, petitioner's commitment rests upon procedures that are no less reliable or constitutionally sufficient than those used to determine the need for civil commitment of persons who are not insanity acquittees. The expiration of the maximum hypothetical sentence petitioner could have received if convicted is accordingly irrelevant to the lawfulness of his continued commitment, which is maintained on the basis of essentially the same criteria as are applied to all other civil committees. Contrary to petitioner's argument, under the scheme devised by Congress his commitment is a true civil commitment, not a sentencing alternative resting upon a finding that he was guilty but mentally ill, which "sentence" might well be limited by the term applicable to others convicted and punished by imprisonment.

ARGUMENT

Petitioner is currently confined in St. Elizabeths Hospital pursuant to a civil commitment ordered under special procedures applicable in the District of Columbia to persons who have committed crimes for which they have been determined not to be responsible by reason of insanity. In order to obtain his release from this commitment, he must make essentially the same showing that is required of other civil committees to obtain their release. Petitioner asserts that he is thereby deprived of due process and equal protection, because his commitment has extended beyond the maximum period for which he could have been imprisoned had he been convicted. His claim of entitlement to treatment different from that of other civil committees is based on the differences between the procedures leading to his commitment and those employed for the commitment of persons who have not prevailed on an insanity defense at a criminal trial—most notably, the fact that his dangerous insanity was never determined under the clear and convincing evidence standard of *Addington* v. *Texas*, 441 U.S. 418 (1979).

Petitioner's contentions are unfounded. As we explain below, petitioner's commitment rests upon findings of present mental illness and dangerousness arrived at through procedures that fully comport with due process. And the proceedings in which these determinations were made were structured so as to yield findings that are no less reliable or constitutionally sufficient than those arrived at through the District of Columbia's regular involuntary civil commitment scheme. The differences between the ordinary civil commitment procedures and those applied to persons acquitted of criminal charges by reason

of insanity are fully justified by the special status of persons in petitioner's class. The maximum hypothetical sentence petitioner could have received if he had been convicted accordingly has no more bearing on the validity of his continued confinement than it would have had had he been committed under the ordinary civil commitment procedures.

While petitioner seeks to mitigate the potentially drastic consequences of his position by limiting his claim to the continuation of commitment beyond the hypothetical maximum sentence for the offense of which he was acquitted (Pet. Br. 9 n.3, 11, 19-20), there is in fact little in his arguments that would justify such a limitation. Rather, as the amici generally appear to recognize,[22] the arguments advanced implicate the adequacy at the threshold of the commitment procedures for any insanity acquittee—those whose disease has led them to commit rape or

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[22] See Georgia Legal Services Program ("GLSP") Br. 6-8; New Jersey Public Advocate ("NJPA") Br. 38-40; ACLU Br. 9-24.

Amicus GLSP suggests that petitioner's failure to appeal from the order of commitment entered after the 50-day hearing bars any challenge to the constitutionality of the commitment procedures used. Because the statute expressly authorizes proceedings to seek release from commitment at any time (subject only to a limitation upon frequency of consecutive challenges) (see D.C. Code Ann. § 24-301 (k) (2), (3) and (7) (1973)), and because petitioner could not know on the date of his 50-day hearing whether he would remain confined beyond the term of a hypothetical sentence, we hesitate to join in the suggestion that petitioner is barred from challenging the continuation of his confinement. We note, however, that because of petitioner's failure to present his contentions at the 50-day hearing, the Superior Court was denied an opportunity to make clear whether the findings grounding petitioner's commitment were supported by clear and convincing evidence (see page 43 & note 34, *infra*).

murder as well as those who lack the capacity to restrain themselves from committing petty thefts. As a consequence, our brief is in large part directed to the general due process (Part I) and equal protection (Part II) problems associated with commitment of any insanity acquittee, following which we separately focus upon the special considerations relating to insanity acquittees whose commitment extends beyond the maximum term of imprisonment that could have accompanied a conviction (Part III). Needless to say—and especially to the extent the Court's decision herein is based on principles of general applicability to all insanity acquittees—we believe the Court should proceed with great caution before imposing a constitutional straightjacket upon the States and the federal government in their efforts to protect society against the dangers that may be posed by persons who have committed criminal acts because of mental illness.

I. PETITIONER'S COMMITMENT WAS ACCOMPLISHED BY PROCEDURES THAT COMPORT WITH THE REQUIREMENTS OF DUE PROCESS

A. District of Columbia Procedures For Commitment Of Insanity Acquittees Strike A Proper Balance Among The Relevant Interests

1. Petitioner's reliance (Br. 8-13) on *Addington* v. *Texas* is misplaced.[23] Petitioner was committed under

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[23] Petitioner raises his *Addington* due process claim for the first time in this Court. In the Superior Court and in the court of appeals petitioner's argument was premised entirely on equal protection principles asserted to be implicit in the Due Process Clause. Petitioner relied on *Baxstrom* v.

a comprehensive integrated scheme fashioned by Congress (1) for the adjudication of claims of insanity raised as a defense to a pending criminal charge and (2) for determination whether persons who successfully raise such a defense are sufficiently

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Herold, 383 U.S. 107 (1966); *Jackson* v. *Indiana*, 406 U.S. 715 (1972); *Humphrey* v. *Cady*, 405 U.S. 504 (1972); and equal protection decisions of the D.C. Circuit. Both the panel of the court below (on each occasion) and the en banc court framed their opinions accordingly (see J.A. 11, 18, 21; J.A. 26, 33-34; J.A. 38, 40, 45-47, 54-56). This Court rendered its decision in *Addington* v. *Texas* subsequent to reargument of this case before the court of appeals panel, but prior to entry of the panel opinion on rehearing. No supplemental brief addressing *Addington* was submitted to the panel by petitioner (see J.A. 7). The panel was aware of this Court's decision in *Addington* (see J.A. 26 n.4) but plainly did not consider its applicability to be in issue. Nor did petitioner brief the *Addington* issue to the en banc court of appeals or otherwise suggest that the panel had overlooked a due process claim founded thereon (see J.A. 7). While we are informed that petitioner's counsel did mention *Addington* at oral argument before the en banc court of appeals, the en banc court plainly did not believe that an independent due process claim had been raised. The en banc court accordingly discussed the requirements of due process only in passing (see J.A. 47-49) and did not undertake to distinguish *Addington*. Under the circumstances, as we observed in our brief in opposition to the petition (page 12 note 13), it is arguable that petitioner's due process claim is not properly presented in this Court. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). Because the Court granted the petition without limiting the questions presented, and because the due process and equal protection issues are closely related (see pages 55, 57-58 and note 50, *infra*), we nonetheless address the due process claim.

mentally ill and dangerous to warrant commitment for their own protection and the welfare of society. The validity of Section 301(d) cannot properly be determined in isolation from this background.

Unlike Addington, whom the State of Texas sought to commit involuntarily without reliance upon the outcome of any prior judicial proceeding, petitioner had, prior to commitment, affirmatively pleaded mental illness as a defense to a criminal charge and had carried the burden of proving that mental illness constituting legal insanity was the cause of his criminal act.[24] Moreover, again unlike Addington, petitioner was found beyond a reasonable doubt to have committed a criminal act.[25] A jury determination of

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[24] Under the *Durham* rule in effect in the local District of Columbia courts at the time of petitioner's trial, coupled with D.C. Code Ann. § 24-301(j) (1973), an insanity acquittal embodied an affirmative finding that the criminal act was "a product of mental disease or mental defect." *Durham* v. *United States*, 214 F.2d 862, 874-875 (D.C. Cir. 1954). The District of Columbia Court of Appeals, following the lead of the District of Columbia Circuit, has since abandoned the *Durham* rule in favor of the American Law Institute test under which the accused must establish both that at the time of the offense he was suffering from a mental disease or defect and that as a result of that disease or defect he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. See *Bethea* v. *United States*, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977); *United States* v. *Brawner*, 471 F.2d 969 (D.C. Cir. 1972). The validity of commitment procedures applied to persons acquitted by reason of insanity in the District of Columbia would appear to be unaffected by this reformulation of the standard for determining insanity in the criminal trial.

[25] It appears that Addington's commitment also followed a misdemeanor arrest. See 441 U.S. at 420. But it does not

both the insanity issue and whether he committed the criminal act charged was available to petitioner. Examined in light of these characteristics, which distinguish petitioner and other insanity acquittees from persons subjected to regular civil commitment procedures, the procedures employed to commit persons in petitioner's situation comport fully with the requirements of due process.

First, petitioner does not challenge the criteria applied in determining that he should be committed.[26] Nor could any such challenge succeed, for while this Court has yet to determine precisely what predicate must be established to justify involuntary civil commitment, its decisions recognize that a showing that an individual is mentally ill and dangerous to himself and others suffices for this purpose. See *O'Connor* v. *Donaldson*, 422 U.S. 563, 573-576 (1975); *id.* at 580-585 (Burger, C.J., concurring); cf. *Addington*, *supra*, 441 U.S. at 421. Second, persons acquitted by reason of insanity are provided at the 50-day hearing with the essential procedures customarily afforded to assure fair and reliable decision-making: notice, a judicial hearing, the right to counsel (court-appointed, if necessary), an opportunity to be heard and present evidence at a meaningful time on all of the issues

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appear that Addington was ever tried upon that charge. Accordingly, at the time of his civil commitment he had not been found by any court to have committed the criminal act charged, much less to have committed the act as a product of mental illness. See page 64, *infra*.

[26] While the District of Columbia Court of Appeals did not clarify that standard fully until it rendered its decision in this case (see page 5 note 4, *supra*), the Superior Court correctly rested its commitment order upon findings that the petitioner remained mentally ill and dangerous to himself and others (May 25, 1976 Tr. 13).

relevant to the court's determination, a prompt on-the-record determination of the issues, and the right of appeal. See D.C. Code Ann. § 24-301(d)(3) (1973).

Petitioner claims, however, that his commitment was fatally defective under *Addington* because the government is not required by Section 301(d) to establish the basis for commitment by clear and convincing evidence. Petitioner misconceives the basis for the holding of *Addington*. To be sure, this Court there held that a traditional civil commitment must rest upon findings supported by clear and convincing evidence. 441 U.S. at 425-427. But that standard was not derived directly from the Constitution, nor was it found to be so deeply anchored in common law as to be a necessary element of due process, as is the "beyond a reasonable doubt" standard applied to elements of the offense in criminal cases. And the Court did not mechanically conclude that the deprivation of liberty entailed in commitment compels application of a heightened standard of proof in every case. Compare *In re Winship*, 397 U.S. 358, 361-364 (1970). Rather, in fixing the level of proof appropriate for ordinary civil commitment proceedings in *Addington*, the Court balanced the individual's interest in minimizing the possibility of an erroneous determination leading to an unwarranted commitment against the "state's interest in committing the emotionally disturbed under a particular standard of proof." 441 U.S. at 425; see also *Youngberg* v. *Romeo*, No. 80-1429 (June 18, 1982), slip op. 13 n.28.[27] Although the Court acknowledged uncertainty

[27] The Court has repeatedly employed this balancing analysis, derived from *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), in order to determine the requirements of procedural

(and a lack of evidence) as to whether triers of fact distinguish between a preponderance of the evidence rule and a clear and convincing evidence standard, the Court carefully weighed the competing interests because of the importance, symbolic if not practical, of the standard of proof as "instruct[ion to] the fact-finder 'concerning the degree of confidence' our society thinks he 'should have in the correctness of [the outcome-determinative] factual conclusions' " (441 U.S. at 423, quoting *In re Winship*, *supra*, 397 U.S. at 370 (Harlan, J., concurring)).

The Court recognized the state's substantial interest as *parens patriae* in providing care and protection to mentally ill persons within its jurisdiction, and its police power authority to protect the community from the dangerously ill. *Addington*, *supra*, 441 U.S. at 426. Yet the Court concluded that "[t]he individual should not be asked to share equally with society the risk of error" (*id.* at 427) because of the magnitude of the liberty interest at stake, the stigmatizing effect of commitment, and the perception that harmless idiosyncratic behavior might too readily form the basis for commitment unless a relatively strict standard of proof were required. *Id.* at 425-427. In addition, the Court noted (*id.* at 426) that only one state other than Texas had adopted a standard as lenient as preponderance of the evidence, implying that the nearly unanimous adoption of a stricter standard reflected a social consensus, relevant to the due process inquiry, as to the weight to be assigned to the com-

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due process in situations where the liberty interests of an individual will be affected by the determination made. In addition to *Addington*, see *Youngberg* v. *Romeo*, *supra*, slip op. 12-14; *Vitek* v. *Jones*, 445 U.S. 480, 494-496 (1980); and *Parham* v. *J.R.*, 442 U.S. 584, 598-613 (1979).

peting interests of the individual and society in the civil commitment context.

In adopting the clear and convincing evidence standard the Court rejected Addington's claim that a higher standard of proof, beyond a reasonable doubt or by "unequivocal" evidence, is required. 441 U.S. at 427-432. The considerations that underlay this conclusion are equally instructive here. The Court first noted that a civil commitment, though onerous, is not an exercise of state power in a punitive sense and does not carry with it the moral sanction of conviction. The Court also noted that the mentally ill as a class are not well served by an unduly strict standard of proof. The diminished liberty and stigma-avoidance interests of mentally ill persons do not require and, in fact, militate against adoption of a standard that would require the state to bear almost the entire risk of judicial error. Finally, the Court recognized that the inherent uncertainty that underlies the diagnoses and predictions of mental health professionals makes use of a reasonable doubt standard impractical, lest the substantial interests that are served by involuntary civil commitment be set at nought.

2. As the Court has recently reaffirmed, the requirements of procedural due process are flexible rather than fixed. See *Youngberg* v. *Romeo*, *supra*, slip op. 12-15; *Parham* v. *J.R.*, 442 U.S. 584, 599-613 (1979). Rather than mechanically applying the holding of *Addington* to the very different facts of petitioner's case, as petitioner and the amici curiae suggest, the Court should employ the balancing analysis that underlies *Addington*, with due attention to the factors that distinguish insanity acquittees from the other members of the population who are subject to civil commitment. As we explain below, the special posi-

tion of one who has sucessfully raised the insanity defense to a criminal charge necessarily affects the balance of interests to be struck.

a. The government's interest in committing an insanity acquittee for necessary treatment and for the protection of the acquittee and society is unmistakable. Such persons have been found, beyond a reasonable doubt, to have committed an act that Congress has determined (by enactment of a criminal statute) to be dangerous to society. See, *e.g.*, *Harris* v *Ballone*, No. 81-6863 (4th Cir. June 10, 1982), slip op. 7; *Warren* v. *Harvey*, 632 F.2d 925, 931 (2d Cir.), cert. denied, 449 U.S. 902 (1980); *In re Franklin*, 7 Cal. 3d 126, 137, 496 P.2d 465, 471, 101 Cal. Rptr. 553, 559 (1972); *Chase* v. *Kearns*, 278 A.2d 132, 134-135 (Me. 1971). This affirmative finding of the past commission of a dangerous act anchors the commitment decision in a way that has no counterpart in ordinary civil commitment proceedings, which often rest entirely upon unavoidably speculative professional assessments of future dangerousness. See *Addington* v. *Texas*, *supra*, 441 U.S. at 429-430; *O'Connor* v. *Donaldson*, *supra*, 422 U S. at 579 (Burger, C.J., concurring); *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956). See pages 49-50, 53, *infra*.

In addition to the special indicia of dangerousness that are present in insanity aquittees but absent from other members of the population, insanity acquittees such as the petitioner have also been affirmatively found to have been mentally ill at the time of the criminal act. Because of these circumstances, the risk that an insanity acquittee will be erroneously found to be dangerously mentally ill based upon the evidence adduced at the Section 301(d)(2) hearing is substantially less than the risk of an erroneous de-

termination in the case of a person with no record of prior criminal acts and no prior finding of recent mental illness. Indeed, in the case of the insanity acquittee, there is a greatly diminshed hazard of improvident commitment resting solely upon "abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable" (*Addington* v. *Texas*, *supra*, 441 U.S. at 426-427). *Warren* v. *Harvey*, *supra*, 632 F.2d at 931.

b. Not only is the risk of erroneous commitment lessened in the case of insanity acquittees, but the interests of the acquittees themselves respecting the standard of proof are not identical to those of others who may face civil commitment. The relevant interests of an insanity acquittee include not only avoidance of commitment but also avoidance of conviction. But under the District of Columbia's statutory scheme, the standard of proof for establishing entitlement to an insanity acquittal is tied to the standard for subsequent commitment. Compare Section 301 (d)(2) with Section 301(j). The legislative history of the present provision makes it clear that Congress deemed it inequitable and improper for the situation to be otherwise. See H.R. Rep. No. 91-907, *supra*, at 74; see pages 4-5, *supra*. Accordingly, were a higher standard of proof to be required to commit an insanity acquittee, Congress apparently would have imposed a higher standard of proof upon defendants pleading insanity.[28]

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[28] That course would not be beyond its power. See page 5 note 3, *supra*. Nor is it in any sense inappropriate to link the two considerations, especially because the special commitment procedure embodied in Section 301(d) applies only to

Whether such a result would serve the interests of those who have occasion to raise an insanity defense is, to say the least, sufficiently open to question that this Court should hesitate before overruling the balance of interests effected by Congress in the statutory scheme. Cf. *Warren* v. *Harvey, supra*, 632 F.2d at 931.[29] The fact that petitioner was permitted to es-

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those who elect to raise the insanity defense and not to those who resist that plea. See page 3, *supra*.

As the Court noted in *Lynch* v. *Overholser, supra*, 369 U.S. at 715, in distinguishing persons in petitioner's situation from those who have not sought to avoid criminal responsibility by a plea of insanity:

> The criminal defendant who chooses to claim that he was mentally irresponsible when his offense was committed is in quite a different position. * * * Congress might have thought * * * that having successfully claimed insanity to avoid punishment, the accused should then bear the burden of proving that he is no longer subject to the same mental abnormality which produced his criminal acts.

[29] In *Benham* v. *Edwards*, 678 F.2d 511, 524-525 & n.24 (1982), the Fifth Circuit has criticized this analysis, suggesting that it approves punishment of the acquitted and asserting that the state has no legitimate interest in committing a person who is not mentally ill to a mental hospital, even if that individual was erroneously acquitted. The Fifth Circuit's criticism is wide of the mark. The issue is not whether society can punish those erroneously acquitted by reason of insanity, but whether a rule that makes civil commitment more difficult, but that also makes an insanity acquittal more difficult to obtain, serves the interests of putative insanity acquittees as a class. Consideration by the Court of interests of potential insanity acquittees that have no counterpart among those subject to ordinary civil commitment proceedings, in determining the relevant requirements of due process, does not render Section 301(d) punitive in either purpose or effect.

tablish his defense by a mere preponderance of the evidence is, as the court of appeals recognized (J.A. 53), for his benefit. Yet once the acquittee has been permitted to establish his mental illness and its connection with his demonstrated dangerousness by a preponderance of the evidence, without more, society has a compelling interest in assigning to the acquittee the burden of proving, with a similar degree of reliability, that these conditions no longer obtain. To impose upon the government the burden of proving by clear and convincing evidence that an insanity acquittee remains dangerously mentally ill would reopen the "revolving door" shut by Congress (see page 4, *supra*), through which persons who are more probably than not dangerously mentally ill escape both the criminal sanction and therapeutic commitment. Surely due process does not command any such result.[30]

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[30] Because operation of Section 301(d) is limited to persons who affirmatively elect, by raising an insanity defense, to invoke the scheme of coordinated burdens of proof, the present system is appropriately tailored to serve society's legitimate interest in discouraging false insanity pleas by persons viewing the plea simply as an avenue for avoiding incarceration. See *Lynch* v. *Overholser*, *supra*, 369 U.S. at 715; *Warren* v. *Harvey*, *supra*, 632 F.2d at 932. Plainly this factor has no counterpart in ordinary civil commitment proceedings.

In *Benham* v. *Edwards*, *supra*, 678 F.2d at 524, the Fifth Circuit discounted society's interest in discouraging false insanity pleas, suggesting that any such interest has punitive "overtones" and is accordingly not to be considered in determining the constitutionally appropriate standard of proof for civil commitment of an insanity acquittee. We disagree. The court of appeals' characterization (J.A. 40-45, 55) of Section 301(d) as nonpunitive is not undermined by recognition of a legislative purpose to deter false insanity pleas. The deterrence of false insanity pleas is an expression of

c. The interests of insanity acquittees in minimizing the risk of erroneous commitment are tempered in another respect as well. Insofar as the balance struck in *Addington* rests upon the stigmatizing effect of commitment (441 U.S. at 425-426), the different situation of insanity acquittees sustains a different rule. Whatever stigma attaches to a person civilly committed under normal circumstances, there is little incremental stigma attaching to civil commitment of an insanity acquittee, who by then has already been found to have been recently mentally ill and dangerous. See *Addington, supra*, 441 U.S. at 429; *Warren* v. *Harvey, supra*, 632 F.2d at 931-932.[31]

d. The unique calculus of interest relevant to commitment of insanity acquittees is reflected not only in Section 301(d), enacted by Congress to govern proceedings in the District of Columbia, but also in the statutes of numerous states. Although the patterns of state law are in considerable flux, in part because of substantial litigation in this area, it appears that a majority of the states retain statutes that require

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the high value placed upon the search for truth in our legal system, not a device to punish those who successfully raise an insanity defense. Cf. *United States* v. *Ceccolini*, 435 U.S. 268, 275-278 (1978). Accordingly, insofar as this deterrence rationale affects the rights of insanity acquittees, it must be regarded as a proper incident of an independent legitimate government purpose. See *Bell* v. *Wolfish*, 441 U.S. 520, 537-538 (1979); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963); *Flemming* v. *Nestor*, 363 U.S. 603, 613-617 (1960).

[31] *Vitek* v. *Jones, supra*, is not inconsistent with this argument, since the particular stigma associated with a finding of mental illness, which is present either in an insanity acquittal or in a civil commitment, is not present in a criminal conviction.

a lesser standard of proof for commitment of insanity acquittees than is required in civil commitments generally. See Note, *Commitment Following an Insanity Acquittal*, 94 Harv. L. Rev. 605, 605-606 & nn.4-6 (1981); see also Note, *Stopping the Revolving Door: Adopting A Rational System for the Insanity Defense*, 8 Hofstra L. Rev. 973, 999-1000 n.105 (1980).[32] And the state and federal courts that have considered the issue have generally agreed that the balance of interests relevant to the standard of proof for commitment of insanity acquittees differs materially from that pertaining to other civil committees.[33]

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[32] According to the cited Harvard Law Review survey (at 605 n.3), only 19 jurisdictions explicitly employ ordinary civil commitment standards for commitment of insanity acquittees. Even those jurisdictions generally retain some special procedures for insanity acquittees. Other jurisdictions have a variety of procedures, including automatic indeterminate commitment following an insanity acquittal, indeterminate commitment upon preliminary findings following a criminal trial but without an evidentiary hearing addressing the issues of present mental status and dangerousness, and automatic temporary commitment followed by a hearing at which a lesser burden is imposed upon the state than in other civil commitment proceedings—the procedure established by Section 301(d).

[33] Most of the decisional law on this subject antedates this Court's decision in *Addington* and like the decision below focuses upon considerations of equal protection. Among decisions rendered subsequent to *Addington* addressing the due process issue, *Harris* v. *Ballone*, *supra*, *Warren* v. *Harvey*, *supra*, and *People* v. *Chavez*, 629 P.2d 1040 (Colo. 1981), distinguish *Addington*. In *Benham* v. *Edwards*, *supra*, 678 F.2d at 521-528, however, the Fifth Circuit has rejected this distinction. See also *Williams* v. *Superintendent*, 43 Md. App. 588, 598-599, 406 A.2d 1302, 1308 (1979). Two intermediate level New Jersey courts have assumed without discussion that *Addington* is controlling in a related context, see

Thus, unlike the Texas provision at issue in *Addington*, which the Court recognized as something of a sport (441 U.S. at 426), Section 301(d) reflects a broad social consensus that the unique circumstances of an insanity acquittee justify confidence in the reliability of a commitment decision reached without requiring clear and convincing evidence of illness and future dangerousness. Section 301(d) is accordingly consistent with the requirements of due process. A

In re Newsome, 176 N.J. Super. 511, 424 A.2d 222 (App. Div. 1980); *In re Scelfo*, 170 N.J. Super. 394, 397, 406 A.2d 973, 975 (App. Div. 1979), but the legislature of that State has recently enacted legislation expressly reaffirming the preponderance of the evidence standard. See N.J. Stat. Ann. § 2C:4-8(b)(3) (1982 N.J. Sess. Law Serv.).

Decisions that treated the due process question prior to *Addington* generally recognized the special considerations that distinguish insanity acquittees from members of the public generally who might be subject to civil commitment. See, *e.g.*, *Alter* v. *Morris*, 85 Wash. 2d 414, 536 P.2d 630 (1975); *State* v. *Kee*, 510 S.W. 2d 477 (Mo. 1974); *Chase* v. *Kearns*, 278 A.2d 132 (Me. 1971); *Mills* v. *State*, 256 A.2d 752 (Del. 1969). Indeed, *State* v. *Kee*, *supra*, *Chase* v. *Kearns*, *supra*, and *Mills* v. *State*, *supra*, go so far as to uphold provisions effecting automatic indefinite commitment of insanity acquittees, subject only to availability of a release procedure. Other pre-*Addington* decisions disapprove on due process grounds state statutes that are significantly less protective than Section 301(d) in its present form, and that resemble the earlier version of Section 301(d) condemned in *Bolton* v. *Harris*, *supra*. See *State* v. *Krol*, 68 N.J. 236, 344 A.2d 289 (1975) (standards not related to purpose of commitment); *Powell* v. *Florida*, 579 F.2d 324 (5th Cir. 1978) (no opportunity to be heard as to present mental illness or dangerousness); *People* v. *McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974) (same); *State ex rel. Kovach* v. *Schubert*, 64 Wis. 2d 612, 219 N.W. 2d 341 (1974) (same).

contrary decision would require the majority of the states to revise their procedures for commitment of insanity acquittees.

B. Petitioner's Commitment Under Section 301(d) Does Not Rest Upon An Impermissible Presumption Of Continuing Insanity And Dangerousness

1. Petitioner (Br. 17-19), joined by the several amici, contends that his commitment rests upon a constitutionally impermissible presumption of continuing insanity and dangerousness. In fact, however, petitioner's commitment rests upon no such presumption. Perhaps petitioner's argument could have been properly directed against Section 301(d) as it stood prior to the 1970 amendments thereto, for under the former scheme a defendant's acquittal on insanity grounds, resting conceivably on no more than a reasonable doubt as to a defendant's sanity, was by itself a sufficient basis for indeterminate commitment. In response to *Bolton* v. *Harris*, *supra*, however, the statute was amended to require a determination of the present mental illness and dangerousness of the acquittee as the predicate for commitment. Petitioner's commitment accordingly rests upon the findings of the Superior Court at the 50-day hearing and not directly upon any presumption of insanity or dangerousness. In petitioner's case, moreover, the government in fact shouldered the burden of producing evidence and successfully carried the burden of proof in that hearing.[34]

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[34] Given petitioner's failure to challenge, by cross-examination or presentation of conflicting testimony, the conclusions of the government's expert witness at the 50-day hearing and his counsel's apparent acquiescence in the findings of the government witness (see page 12 & note 15,

We have suggested, it is true, that the finding of insanity and commission of an unlawful act at the criminal trial has a legitimate bearing upon the standard of proof that may be utilized at an ensuing commitment hearing. But the legislature's consideration of the existence of such findings in fixing the appropriate legal standard for commitment of insanity acquittees cannot properly or usefully be regarded as the functional equivalent of a mandatory rebuttable presumption of continuing dangerous mental illness, as petitioner claims. What Congress has done in Section 301(d) is simply to set burdens of production and persuasion. Such an action involves a "presumption" only in the trivial sense that every allocation of trial burdens of proof "presumes" that proof falling short of the assigned standard is insufficient to establish the ultimate fact at issue and that proof surpassing the standard is sufficient to do so (*e.g.*, instead of saying that the plaintiff in a personal injury action must establish the defendant's negligence by a preponderance of the evidence, we could instead say that the defendant's infliction of injury upon the plaintiff is "presumed" not to have been negligent, or that it is "presumed" to have been negligent if that conclusion is indicated by a preponderance of the evidence).

In other words, if we are correct in our preceding argument that the procedures at the 50-day hearing are sufficiently fair and reliable to support commit-

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supra), it is doubtful that petitioner can complain of the committing court's failure to tie its findings explicitly to the standard of clear and convincing evidence. See page 28 note 22, *supra*. The *only* evidence presented was that petitioner remained mentally ill and dangerous to himself or others.

ment of an insanity acquittee, and that *Addington* does not require a different conclusion, then characterizing the hearing as entailing a presumption of continuing insanity simply has no bearing upon its constitutionality.[35]

We recognize, of course, that in addition to adopting a standard of proof lower than clear and convincing evidence, Section 301(d) on its face places the burden of persuasion, and apparently the burden of going forward as well, upon the insanity acquittee facing commitment.[36] The validity of these aspects of the scheme is not before the Court, however, for they were not actually employed in petitioner's case.[37]

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[35] Petitioner and the amici curiae rely upon *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979); *Ulster County Court* v. *Allen*, 442 U.S. 140, 166-167 (1979); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); and *Leary* v. *United States*, 395 U.S. 6 (1969), for this aspect of their challenge to Section 301(d). In those cases the Court has addressed the strictures that due process imposes on various kinds of presumptions employed in criminal prosecutions to establish from other facts in evidence a fact not proven by direct evidence. But those cases have no application here. The Section 301(d) commitment procedure is not a criminal proceeding and therefore does not implicate the special concerns about shifting the burden of production or persuasion to the defendant that exist in criminal cases. Moreover, the 50-day hearing entails no reliance upon indirect proof as to the facts supporting commitment. Rather, these are to be established directly by relevant evidence adduced in the Section 301(d) hearing.

[36] The practical effect of assigning the burden of proof to one party or another is doubtful when the standard of proof is a mere preponderance of the evidence. It is only in the hypothetical case where the evidence is in absolute equipoise that such distinctions matter.

[37] Indeed, we understand that, despite the language of Section 301(d), it is the usual practice of the courts to take

The assignment of the burden of proof to the insanity acquittee is, in any event, not impermissible. That allocation rests upon a host of factors, including the special interests of potential insanity acquittees as a class in the accessibility of the insanity defense. Because defendants are permitted to escape criminal responsibility by advocating their own insanity and establishing the same by a mere preponderance of the evidence, it is entirely appropriate to place upon the insanity acquittee the burden of affording reasonable assurance that his release will not cause danger to himself or others because of the very mental disease that produced—and excused—his criminal act. If this is to be regarded as a presumption of continuing insanity, it is not impermissible. The record of this case contains no evidence to overcome the teaching of common experience that validates this "presumption." But in the final analysis this "presumption" rests not solely upon its verisimilitude, but upon the need to maintain the moral integrity of the criminal sanction and of the insanity defense. By purposely availing himself of the insanity defense, petitioner knowingly assumed and thus properly was subjected to the burden established by Section 301(d).

Finally, unlike the presumptions condemned in *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) (see

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expert testimony addressing the issues of mental illness and dangerousness at 50-day commitment hearings from the staff of St. Elizabeths Hospital, whether or not evidence supporting release is offered by the acquittee. Accordingly, it does not appear that commitments are in practice ordered solely on the basis of an acquittee's failure to present evidence of remission of illness or nondangerousness. Moreover, we are advised that it is not uncommon for the commitment findings to take the affirmative form employed in petitioner's case.

page 45 note 35, *supra*), what the court of appeals imprecisely described (J.A. 51) as "a rational and permissible evidentiary presumption" is not really a presumption at all, for it rests not upon an arbitrary rule of law or even upon evidence or facts in the commitment proceeding, but upon the *findings* arrived at in the prior criminal trial respecting the very facts said to be "presumed" at the 50-day hearing. These findings, of course, do not foreclose litigation regarding the effect of the passage of time between the criminal action and the date of the commitment hearing on the defendant's mental illness or dangerousness. But due regard for considerations of judicial economy and judicial integrity justify the assignment of the burden of proving recovery to the insanity acquittee who has successfully established his past insanity. Compare *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971), with *Sanders* v. *United States*, 373 U.S. 1, 15-19 (1963)[38]

2. Citing empirical surveys, the amici argue (ACLU Br. 14-16; GLSP Br. 26-29; NJPA Br. 28-32), however, that insanity acquittees are insufficiently likely to repeat harmful conduct to justify their removal from society by application of procedures different from those applied in ordinary civil

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[38] As a practical matter judicial economy and public protection considerations require that some weight be attached to a prior finding of insanity at many junctures in the commitment process. For instance prior findings support temporary commitment of insanity acquittees for evaluation (a practice uniformly approved by the courts), as well as limitations on the frequency of release applications, and assignment of the burden of proof on releasability to the committee, both of which are common features of civil commitment schemes.

commitments.[39] The studies cited are inapposite, however, because none of them addresses a population of insanity acquittees. Moreover, each of the studies covers the behavior of involuntary committees found to be releasable, a finding that could not be made in petitioner's case (see page 15 & note 18, *supra*); none of the studies sheds light upon the behavior of the distinct class of persons found unreleaseable.[40] So far as we are aware, no research find-

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[39] We note that none of the materials cited were called to the attention of the courts below. Particularly problematic is reliance upon the record in *Benham* v. *Edwards*, *supra*, compiled by amicus GLSP.

[40] For instance, Steadman & Keveles (*The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 Am. J. Psych. 304 (1972)) studied the recidivism rate among individuals released into the community from New York's correctional mental hospitals in response to this Court's decision in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966). None of those individuals was an insanity acquittee; the class affected by *Baxstrom* consisted of convicted criminals who were subsequently administratively determined to be insane at the expiration of their prison term. 383 U.S. at 108-109. There is no reason to assume that this group is interchangeable with persons found to have committed a criminal act as a product of legal insanity. See page 31 note 24, *supra*. Similarly, T. Thornberry & J. Jacoby (*The Criminally Insane* (1979)) studied the arrest rate among individuals released to the community on the basis of a review procedure established pursuant to the decision in *Dixon* v. *Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971). Less than 2% of the sample studied consisted of insanity acquittees, and the majority of the group consisted of convicts subsequently administratively labeled insane. T. Thornberry & J. Jacoby, *supra*, at 65-66. The subject population also included some civil committees. *Ibid.* No effort was made to distinguish among these factually and legally distinct classes in the study conducted. In both of the aforementioned

ings are available that directly assesses the likelihood of future dangerous mental illness among insanity acquittees.[41] But what research is available suggests that past dangerousness, at least in the case of violent criminal conduct, is the most powerful available indicator of a high probability of future

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studies a substantial portion of the class affected by the relevant judicial decision remained in some form of civil commitment. The data collected concerning those who were released to the community is plainly not probative as to those deemed unsuitable for release.

[41] The amici appear to assume (see GLSP Br. 29 n.9; ACLU Br. 15 n.26) that the relevant comparison is between insanity acquittees and persons actually committed by ordinary civil process, or other classes of persons who present reason for heightened expectations of repeated anti-social conduct, such as paroled convicts. See also *Benham* v. *Edwards*, *supra*, 678 F.2d at 523-524 (rejecting view that "insanity acquittees are *more* dangerous" than civil committees (emphasis in original)). But in determining the standard of proof necessary to assure due process, the relevant comparison is between the classes of persons subject to commitment under each statutory scheme. In the case of Section 301(d), the class affected is limited to insanity acquittees. But ordinary civil commitment procedures could in theory be applied to any one of us. There are, to be sure, institutional safeguards of varying efficacy that protect against such abuse, but the constitutionally required standard of clear and convincing evidence was nonetheless designed with a view toward the virtually universal applicability of the civil commitment mechanism. See *Addington*, *supra*, 441 U.S. at 426-427. Because Section 301(d) is, by contrast, applicable only to the special class of insanity acquittees, the special procedures employed may be justified by reference to the characteristics that set insanity acquittees apart from the general population, any of whom is theoretically subject to civil commitment procedures, as well as from the class of persons actually subjected to civil commitment.

dangerous conduct. See, *e.g.*, J. Monahan, *The Clinical Prediction of Violent Behavior* 71-72, 80-82 (1981); Cocozza, Melick & Steadman, *Trends in Violent Crime Among Ex-Mental Patients*, 16 Criminology 317 (1978); Rabkin, *Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research*, 86 Psych. Bull. 1, 21 (1979).[42] These empirical findings confirm that the risk of an erroneous determination of dangerousness is substantially less for insanity acquittees than it is for those subject to ordinary civil commitment procedures.

The same is plainly true of the determination of mental illness. Petitioner and the amici argue that a variety of factors deprive the prior finding of insanity of any force that warrants consideration in determining the requisites of due process. Among these are (1) differences between the substantive elements of the insanity acquittal standard and the commitment standard, and (2) the lapse of time between the criminal act and the commitment, which allows for changes, both spontaneous and therapeutically induced, in the acquittee's mental state. These factors do not, however, undercut the rationale for the special commitment procedures applied to insanity acquittees.

To be sure, the tests for insanity as a defense to criminal charges and as a basis for civil commitment

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[42] In his view of the literature on this subject Professor Monahan highlights (at 80-81; emphasis omitted) a key finding of Cocozza, Steadman & Melick's research:

> [C]ompared with the general population, the higher rate of violent crime committed by released mental patients can be accounted for entirely by those patients with a record, particularly an extensive record, of criminal activity that predated their hospitalization.

are not identical. But it can hardly be questioned that under either the *Durham* rule applied in petitioner's case or the ALI definition of insanity (see page 31 note 24, *supra*), a finding of insanity is tantamount to mental illness for commitment purposes. On the other hand, contrary to the suggestion of GLSP (Br. 31-35), the finding of competency to stand trial at a time between the criminal act and the commitment is irrelevant, because the standard for determining competency at trial is entirely distinct from the standard for determining mental illness for commitment. See *In re Franklin*, *supra*, 7 Cal. 3d at 141 n.9, 496 P.2d at 474 n.9; 101 Cal. Rptr. at 562 n.9. This contention is especially frivolous where, as here, the competency report reflected that petitioner, although competent to stand trial, was severely mentally ill and required hospitalization. See page 11 note 14, *supra*. Nor does available scientific knowledge suggest, as the amici would have the Court believe, that an acquittee's insanity at the time of the criminal act has no bearing upon the likelihood that mental illness is present at the time of the commitment hearing. Indeed the very authorities cited by the amici confirm the contrary. See, *e.g.*, L. Kolb, *Modern Clinical Psychiatry* 342-343 (8th ed. 1973).[43]

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[43] Professor Kolb reports, for instance (at 343), that the class of patients diagnosed as suffering from schizophrenic psychoses have the following prognosis:

> Roughly, about one-third of those patients who are hospitalized during the first year of their illness make a fairly complete recovery; one-third improve and become able to return to outside life but remain damaged personalities and may have to return to the hospital from time to time. The remaining third will require indefinite

With all proper respect for the mental health professions, we think it remains true today that "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment * * *." *Greenwood* v. *United States*, *supra*, 350 U.S. at 375. Accordingly, here as in *Greenwood* (*id.* at 376), "denial of constitutional power of commitment to Congress * * * ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues." See also *Powell* v. *Texas*, 392 U.S. 514, 535-537 (1968) (opinion of Marshall, J.). Indeed, "[w]ith all that we do not know about mental illness and social accountability for the acts of mentally ill persons, it is too soon * * * to move into place fixed constitutional concepts that may well prevent [Congress and the states] from working their way to * * * acceptable solution[s] to [these] complex problem[s]." *Benham* v. *Edwards*, *supra*, 678 F.2d at 543 (Roney, J., dissenting).

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hospital care. The introduction of the modern pharmaceutical therapies has not brought about a reduction in the number of schizophrenic patients requiring hospital care whose illness pursues a chronic course.

Consequently, the passage of some time between commission of a criminal act and a subsequent commitment hearing (see Pet. Br. 15; ACLU Br. 12; GLSP Br. 27) is not sufficient reason to disregard the earlier finding. We note that the possibility of substantial delay has been greatly restricted by the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, and by this Court's decision in *Jackson* v. *Indiana*, *supra*. See also *United States* v. *DeBellis*, 649 F.2d 1 (1st Cir. 1981); *State ex rel. Deisinger* v. *Treffert*, 85 Wis. 2d 257, 270 N.W. 2d 402 (Sup. Ct. 1978).

C. Application of the Clear and Convincing Evidence Standard to Commitment of Insanity Acquittees is Mandated Neither By the Inherently Speculative Nature of Expert Testimony, Nor By the Nature of Petitioner's Offense

1. The amici suggest (ACLU Br. 16-17; NJPA Br. 33-35; GLSP Br. 29-31) that a clear and convincing evidence standard is necessary to correct for the inability of mental health professionals to predict future dangerousness accurately and for their apparent propensity to overpredict dangerousness. This argument is apt in *Addington's* traditional civil commitment context but misplaced here, for the reliability of the determinations that underlie commitment of an insanity acquittee is likely to be greater than that of determinations made in other contexts. Unlike the ordinary civil commitment, which may rest entirely upon professional predictions, an insanity acquittee has demonstrated his dangerous propensity by past criminal conduct. As discussed above (pages 49-50), the available research shows that past violent conduct is the best determinant of future violent conduct. Accordingly, the risk of erroneous commitment determinations respecting insanity acquittees seems likely to be lower than that the comparable risk as to other civil committees.

2. Petitioner (Br. 14-16) and amicus GLSP (Br. 15-17 & nn.5, 36-39) argue that reliance upon an acquittee's prior criminal act as an indication of dangerousness justifying commitment is misplaced in the present case because of the petty nature of petitioner's offense. Despite its superficial appeal, this contention is unsound. Petitioner "confuse[s] danger with violence." *Overholser* v. *O'Beirne*, 302 F.2d 852, 861 (D.C. Cir. 1961). Petitioner does not question, nor could he, Congress' power to punish petit lar-

ceny through the criminal sanction. Accordingly, while some might urge a different rule as a matter of policy, the Due Process Clause does not authorize the courts to second-guess Congress' judgment that Section 301(d) should apply irrespective of the criminal offense charged.[44] As the District of Columbia Circuit explained in *Overholser* v. *O'Beirne*, *supra*, 302 F.2d at 861:

> Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both. Larceny, assault and murder are all dangerous; they are simply different areas of prohibited conduct. Hence unless we are to ignore the objectives and policies of the statute in question, the release provisions must apply in the same way and with the same force to larceny without violence as to a crime of violence until Congress speaks otherwise.

An insanity acquittal embodies a finding that the defendant's behavioral controls were inoperative or gravely impaired. See page 31 note 24, *supra*. The probability of repetition of unlawful conduct is accordingly enhanced. Therefore, even if the maximum sentence prescribed is taken as an index of the dangerousness of a single repetition of a criminal act, a relatively short sentence does not negate the dangerousness of the insanity acquittee, as that concept relates to the commitment process.

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[44] This is especially clear because Section 301(d) does not apply unless the defendant purposely avails himself of the insanity defense.

II. SECTION 301(d) DOES NOT DENY EQUAL PROTECTION TO INSANITY ACQUITTEES

A. Strict Scrutiny Of Differences Between Commitment Procedures For Insanity Acquittees And Those For Other Civil Committees Is Not Required

The arguments of petitioner and the amici based upon the equal protection component of Fifth Amendment due process largely repeat the contentions made under the rubric of due process. And our response is largely the same as well: the special considerations that alter the balance of interests relating to the proper standard of proof also amply justify the differences between the procedures afforded to insanity acquittees and those afforded to other persons subject to civil commitment in the District of Columbia, for "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940).

The entirely rational relationship between the special attributes of insanity acquittees and the special procedures applied is explained below at pages 58-64. We pause, however, to consider petitioner's contention (Br. 22 & n.18; see also GLSP Br. 17-22) that the differences between the commitment procedures prescribed by D.C. Code Ann. § 24-301(d) (1973) for insanity acquittees and those prescribed for other persons by D.C. Code Ann. § 21-541 *et seq.* (1973) require application of strict scrutiny analysis because a liberty interest is involved. That contention has no merit.

As the Fifth Circuit recognized in *Benham* v. *Edwards*, *supra*, 678 F.2d at 515-516 n.9, this Court has never held that deprivation of liberty alone necessitates strict scrutiny for classifications pertaining to involuntary confinement. See *Marshall* v. *United States*, 414 U.S. 417, 422 (1974) (criteria for re-

habilitation of narcotics offenders in lieu of imprisonment); compare *id.* at 431-433 (Marshall, J., dissenting).[45] This Court's equal protection decisions in the area of commitment and detention for mental health reasons have consistently applied the rational relationship analysis. Starting in *Baxstrom* v. *Herold*, *supra*, the test applied was whether the "distinction made [has] some relevance to the purpose for which the classification is made." 383 U.S. at 111. In *Jackson* v. *Indiana*, *supra*, 406 U.S. at 729, the statutory classification was tested against a "reasonable justification" benchmark.[46] The lower courts have generally applied the rational relationship analysis as well.[47]

Strict scrutiny analysis (which, we submit, the statutory scheme would survive) is not indicated here, because an insanity acquittee does not possess an unqualified liberty interest.[48] In rejecting imposi-

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[45] Justice Marshall acknowledged (414 U.S. at 432) that "this case does not fit into any neat 'fundamental interest' or 'suspect classification' mold."

[46] To be sure, the classifications considered in *Baxstrom* and *Jackson* did not withstand scrutiny under the rational relationship test. But the Court's language, especially in *Baxstrom*, clearly reflects the applicable standard.

[47] See, *e.g.*, *Harris* v. *Ballone*, *supra*, slip op. 7-10; *Powell* v. *Florida*, *supra*, 579 F.2d at 331-332; *People* v. *Chavez*, *supra*, 629 P.2d at 1051-1052; *In re Franklin*, *supra*, 7 Cal. 3d at 135, 496 P.2d at 470, 101 Cal. Rptr. at 558; *Mills* v. *State*, *supra*, 256 A.2d at 756; *Chase* v. *Kearns*, *supra*, 278 A.2d at 138. See also *Benham* v. *Edwards*, *supra*, 678 F.2d at 515-516 n.9 (rejecting strict scrutiny). We note that the panel opinion in *United States* v. *Cohen*, *supra*, cited by GLSP (Br. 21), has been vacated. See page 6 note 5, *supra*.

[48] The distinctions at issue here are merely procedural. The Court has no occasion to consider whether commitment

tion of a requirement of proof beyond a reasonable doubt in *Addington*, the Court explained (441 U.S. at 429): "One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma." See also *Mills* v. *Rogers*, No. 80-1417 (June 18, 1982), slip op. 11. This observation has special force where, as here (and unlike *Addington*), commitment follows a prior finding of insanity. Moreover, a strict scrutiny analysis is unwarranted, and indeed unworkable, because as we have explained above (pages 37-39), the liberty interests of potential insanity acquittees are conflicting: whatever standard of proof is applied in commitment proceedings may well be reflected in the standard employed for the insanity defense. In this respect, the interests of a defendant who has yet to be tried are opposite to those of the individual acquitted on insanity grounds. Yet, because the standards applied in the two situations can be appropriately linked, the interests of the potential insanity acquittee and the constitutionality of the statutory scheme must be considered with reference to the entire procedure.

The genesis of the disparity between the standards of proof applied to civil commitment generally and at the 50-day hearing for insanity acquittees further demonstrates the inapplicability of strict scrutiny analysis—indeed, the lack of any serious equal protection issue. The difference in standards is not the product of any legislative classification; the natural reading of D.C. Code Ann. § 21-545 (1973), the general civil commitment statute, is that commitment may be ordered on the basis of proof by a preponder-

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of insanity acquittees resting on application of substantive criteria different from those for other civil commitments would require heightened scrutiny.

ance of the evidence.[49] The injection of a stricter standard of proof for civil commitment is solely the product of judicial interpretation of constitutional due process requirements—most recently, the imposition of the clear and convincing evidence requirement of *Addington*. *In re Nelson*, *supra*, 408 A.2d at 1237 n.7; see page 10 & note 13, *supra*. But if we are correct in our argument in Part I that due process permits commitment of insanity acquittees on the basis of a preponderance standard (and if that is not correct, there is no need even to consider the equal protection issue), then the difference in standards is solely attributable to the judicial determination that the process due the two classes of committees is different. The differences that justify this conclusion for due process purposes almost by definition justify it for equal protection purposes.[50]

B. The Procedural Differences Between The Two Statutory Schemes Are Justified By The Circumstances That Distinguish Insanity Acquittees From Other Persons Subject To Civil Commitment

1. Petitioner's argument rests on three differences between the procedures prescribed by Section 301(d)

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[49] Indeed, the District of Columbia Circuit so interpreted that statute in *Bolton* v. *Harris*, *supra*, 395 F.2d at 651 n.50.

[50] We recognize that this analysis does not apply fully to those procedural differences created by Congress, including the differing jury trial rights afforded to insanity acquittees and other civil committees. But see *People* v. *Chavez*, *supra*, 629 P.2d at 1052 & n.22. Nonetheless, it cannot be a matter of indifference for purposes of equal protection analysis that the statutory scheme is determined to comport with due process based upon consideration of the special factors and circumstances applicable to the class involved. This is especially true where, as here, any right to equal protection arises only from the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

and those prescribed for other civil commitment proceedings: (1) the use of a preponderance-of-the-evidence standard of proof; (2) the assignment of the burden of proof to the acquittee; and (3) Congress' failure to provide for a right to a jury trial at the 50-day hearing.[51] As we have explained above in connection with the due process issue, the procedures employed to commit insanity acquittees in the District of Columbia are carefully adjusted to the special situation of insanity acquittees as a class. Discussion of the equal protection issue may accordingly be abbreviated.

The provisions of Section 301(d) respecting the standard and burden of proof do not deny petitioner equal protection.[52] The use of a preponderance of the evidence standard of proof is, as the court of appeals recognized (J.A. 53), intended for the benefit of the would-be insanity acquittee, who is governed by a commensurate standard of proof in establishing his

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[51] Petitioner, joined by amicus GLSP (Br. 12-22), also complains (Br. 21-22) of differences in the applicable release procedures. This claim was not presented in the court of appeals and was not addressed by the en banc court (J.A. 50 n.19; see page 17 note 20, *supra*). It accordingly should not be considered here. Consideration of alleged disparities in release procedures would be particularly inappropriate because the panel, in its initial opinion, directed certain adjustments in the release procedures (J.A. 21 & n.10), similar to those instated by the District of Columbia Circuit under the pre-1970 version of Section 301(d), in *Bolton* v. *Harris*, *supra*, 395 F.2d at 652. Plainly petitioner's contentions in this connection are more properly directed to the District of Columbia courts. We accordingly do not address any disparities in the release procedures.

[52] As explained above (page 45), the question whether the burden of proof may properly be assigned to the insanity acquittee is not presented in this case.

insanity defense. The legitimate legislative perception of a need to harmonize the standards for acquittal and commitment, a factor entirely absent in the civil commitment context, explains and justifies the difference in treatment of these differently situated individuals. The preponderance standard is also justified, as discussed above, by the lesser risk that an erroneous finding of dangerous insanity will be made in committing an insanity acquittee, because of the prior findings of legal insanity and, by proof beyond a reasonable doubt, of commission of an unlawful act. The diminished liberty and stigma avoidance interest of such persons also set them apart from citizens who have not avoided responsibility for an otherwise criminal act by establishing insanity. And the sovereign's interest in deterring false insanity pleas, which has no counterpart to be considered in other civil commitments, also supports the classification.[53] See also pages 57-58, *supra*.

The unavailability of a jury trial is likewise justified by the special circumstances of an insanity acquittee. Unlike other civil committees, an acquittee has already had the right to a jury determination of his insanity as of a time in the recent past. Perhaps more significantly, commitment of an insanity acquittee cannot proceed under Section 301(d) unless the criminal trial has established beyond a reasonable doubt that the individual has committed an unlawful antisocial act. This affords a substantial protection against commitment based solely upon the

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[53] The same considerations justify assignment of the burden of proof to the insanity acquittee, although, as we have explained (see page 45 n.37, *supra*), this formal allocation is not in practice regarded as placing the burden of producing evidence on the acquittee.

often unavoidably speculative predictions of mental health professionals as to future conduct—protection that is unavailable to other civil committees. Although the issues before the jury in the criminal trial and before the judge in the 50-day hearing are not identical, they are in general sufficiently similar that Congress' decision not to provide two jury trials for insanity acquittees cannot be said to exceed its "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of [government] to remedy every ill." *Plyler* v. *Doe*, No. 80-1538 (June 15, 1982), slip op. 13.

2. Contrary to the contention of petitioner and the amici, the decision of the court of appeals does not conflict with any decision of this Court. Reliance upon *Baxstrom* v. *Herold*, *supra*, is misplaced. In *Baxstrom* the petitioner had been convicted of a criminal offense and sentenced to a term of imprisonment. During that term, he was "certified" to be insane by a prison physician and was transferred to serve the balance of his sentence at a hospital operated by the state prison authority. No hearing or adversary process of any kind was afforded him. See *Vitek* v. *Jones*, *supra*, 445 U.S. at 494-496. Shortly before his sentence expired, a hearing was held at which a judge determined that Baxstrom "may require mental care and treatment." See 383 U.S. at 109. On the basis of this finding, Baxstrom remained committed to the correctional hospital beyond the expiration date of his sentence. This Court held that Baxstrom had been denied equal protection by his civil commitment at the end of his sentence without the opporunity, afforded to all others civilly committed under state law, for a

jury determination of the need for commitment. 383 U.S. at 110-112. The Court held further that Baxstrom was denied equal protection by his commitment to a correctional institution (rather than a civil mental hospital) without a judicial determination (available to nonprisoners) that he was so dangerously mentally ill as to require confinement in such an institution. 383 U.S. at 110, 112-115.

Baxstrom, in the Court's view, was indistinguishable from a non-criminal facing civil commitment, since neither person has been provided any prior opportunity for a jury determination of mental illness. 383 U.S. at 111-112. The *Baxstrom* Court recognized, however, that "[e]qual protection does not require that all persons be dealt with identically," holding only that "it does require that a distinction made have some relevance to the purpose for which the classification is made." 383 U.S. at 111 (citation omitted). That test is satisfied here. The provisions of D.C. Code Ann. § 24-301(d) (1973) applied to petitioner are tellingly different from the procedures applied to Baxstrom. And petitioner's status is different in key respects from Baxstrom's. Unlike Baxstrom, whose conviction in no respect reflected any finding of mental illness or need for hospitalization, petitioner was found to have committed a criminal act that was the product of insanity at his criminal trial. And petitioner was afforded a judicial commitment hearing, with the right to court appointed counsel, at which his present insanity and dangerousness was established. Compare 383 U.S. at 109 n.1. To be sure, petitioner was not afforded a jury trial, such as is available to civil committees, at this second juncture. That procedural difference, however, is justifiable because of the earlier opportunity for a jury

determination respecting petitioner's sanity at the time of his crime. Thus, unlike Baxstrom, petitioner has been afforded the protection of reliable procedures for the purpose of determining the relevant fact—*i.e.*, whether or not he is dangerously mentally ill.

The court of appeals properly distinguished *Jackson* v. *Indiana*, *supra*. *Jackson* proscribes indefinite commitment of one charged with a criminal offense but found incompetent to stand trial. The Court found a denial of equal protection stemming from application of a criterion different from that applied to civil commitments. 406 U.S. at 723-730. Here, however, the criterion applied to petitioner is identical to that applied to civil committees—continued commitment rests on a finding of mental illness and dangerousness for both types of committees. See page 5 note 4, *supra*. *Jackson* also found a denial of due process in a commitment, premised solely upon the pendency of criminal charges, of an individual unable to attain competency for trial. 406 U.S. at 738. The Court did not question the state's power to commit such a person upon a showing of dangerous mental illness—noting only that Indiana had not detained Jackson on that basis. 406 U.S. at 737. Here, unlike *Jackson* (406 U.S. at 738), the "nature and duration of commitment bear[s] some reasonable relation to the purpose for which the individual is committed." [54]

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[54] *Specht* v. *Patterson*, 386 U.S. 605 (1967), is likewise inapposite. There the defendant was convicted of a sexual offense but, in lieu of an ordinary term, was "sentenced" to an indeterminate term of confinement under a separate procedure applicable to sex offenders. No opportunity was given for a hearing at which defendant might present evidence or confront adverse witnesses with respect to the need for such confinement. The Court found a denial of due process

3. The various amici suggest that the classification effected by Section 301(d) is irrational because underinclusive: excluding convicted criminals who become mentally ill during their sentences, persons suspected of minor criminal acts who are diverted to ordinary civil commitment proceedings in lieu of trial, and insane ex-convicts in need of treatment. None of these classes, however, is situated comparably to insanity acquittees. Members of the second group have never been determined to have committed a criminal act evidencing dangerousness. Prisoners and ex-convicts who became insane have not been judicially determined to be mentally ill. And none of these groups consist of people who have been previously adjudicated to have committed a crime as a result of mental illness. Accordingly, the claim of impermissible underinclusiveness is insubstantial.

III. THE MAXIMUM HYPOTHETICAL SENTENCE IS IRRELEVANT TO THE LEGALITY OF PETITIONER'S DETENTION

As we have shown, petitioner's continued dangerous mental illness was established by procedures that comport with due process and are reasonably adapted to the unique situation of an insanity acquittee. Accordingly, the only question that could be raised about the continuation of petitioner's commitment would relate to the release procedures established by law. But, as we have explained (see page 59, note

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because punishment was imposed, in a proceeding separate from the criminal trial, based upon a finding of fact as to the defendant's dangerous propensities which he had not been allowed to litigate. 386 U.S. at 608-610. Here, by contrast, petitioner was afforded a full and fair hearing on the questions on which his commitment turned.

51), petitioner did not challenge these release procedures in the court of appeals, and the court of appeals did not consider any such question. Nor has petitioner taken any appeal from the denial of the application for unconditional release that he filed pursuant to D.C. Code Ann. § 24-301(k) (1973), after the Superior Court had rejected his claim that he was entitled to release because of expiration of the maximum sentence he could have received (see page 15, note 18, *supra*).

The expiration of the maximum sentence that petitioner could have received if convicted is, as the court of appeals recognized (J.A. 42) and as amicus curiae GLSP concedes (Br. 8-11), simply irrelevant to the permissible duration of petitioner's commitment, for, unlike the situation in *Specht* v. *Patterson*, *supra*, *Humphrey* v. *Cady*, 405 U.S. 504 (1972),[55]

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[55] In *Humphrey* the defendant had been convicted of a crime and committed to a sex deviate facility in the state prison in lieu of sentence. Under the Wisconsin statute at issue, such a commitment ran for the duration of the sentence but could be renewed for an unlimited number of five-year terms upon a finding of need for continued treatment at the conclusion of the preceding term. The prisoner challenged his continuing commitment under this statute by petition for a writ of habeas corpus. He argued that, as a matter of equal protection, he was entitled to a jury trial, at least at the hearing held to determine whether his commitment should be renewed. This Court did not adjudicate the merits of this contention, holding merely that petitioner's claim was not so insubstantial as to justify the district court's dismissal of the petition without an evidentiary hearing. 405 U.S. at 508. To be sure, the Court noted the State's suggestion that the difference was justified by the fact that the commitment was merely an alternative form of sentencing, responding (405 U.S. at 510-511; footnote omitted) that the contention

> arguably has force with respect to an initial commitment * * * which is imposed in lieu of sentence, and is

and *McNeil* v. *Director of Patuxent Institution*, 407 U.S. 245 (1972),[36] petitioner's confinement does not rest upon such a conviction. Rather, his commitment rests upon the finding of fact—reached by an appropriate procedure—that he is dangerously mentally ill. The validity of that finding, twice made at the outset of his confinement and reviewable at regular intervals upon petitioner's application, is no more subject to decay over time than the findings upon which other civil commitments rest. Nor is that

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limited in duration to the maximum permissible sentence. The argument can carry little weight, however, with respect to the subsequent renewal proceedings, which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime.

But these comments do not support petitioner's contention that his commitment must terminate with the expiration of his sentence, for petitioner's confinement does not rest upon conviction of a crime, nor is his commitment a sentencing alternative. Rather, while petitioner's commitment was triggered by an acquittal that embodied a finding that petitioner's insanity had produced a criminal act, it rests upon a subsequent finding of mental illness and dangerousness. Moreover, petitioner has had an opportunity for jury review of these key questions. The omission of an opportunity for a jury trial at the 50-day hearing is accordingly permissible.

[36] In *McNeil*, *supra*, the defendant was sentenced to a fixed term upon conviction of a crime and was referred for evaluation of his mental and emotional health on the basis of an *ex parte* judicial determination. The Court concluded that the defendant could not be held for evaluation beyond the end of his five-year sentence, as there had been no judicial determination that confinement beyond that time was warranted. Here, of course, petitioner's confinement rests upon the judicial determination that he presently remains dangerously mentally ill.

finding dissipated by the expiration of the maximum sentence petitioner could have received.[57] There is accordingly no warrant for requiring the government to bear the burden of proving continued dangerous insanity by recommitting insanity acquittees after the passage of a certain amount of time—a right not afforded other civil committees. To do so might well raise equal protection questions more substantial than those suggested by petitioner.

Petitioner seeks to convert the judgment of "not guilty by reason of insanity" into a verdict of "guilty but mentally ill" culminating in a determinate sentence to be served in an appropriate facility. The "guilty but mentally ill" verdict has been adopted by several states as an alternative to the traditional insanity verdict. See, *e.g.*, Mich. Comp. Laws Ann. §§ 768.29a(2), 768.36(3) (West Supp. 1982). We assume this is a permissible policy decision. But that decision is one properly entrusted to the legislative branch. As the court of appeals concluded, Congress did not opt for such a punitive scheme for the District of Columbia. Petitioner's commitment rests upon findings of present insanity and dangerousness warranting confinement and treatment, and not upon any punitive interest. Accordingly, the Court must regard

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[57] As is explained in greater detail in our brief in opposition to the petition (pages 23-27), petitioner's reliance (Br. 28) upon decisions of the District of Columbia Circuit is misplaced. Those decisions were rendered under Section 301(d) as it stood prior to the 1970 amendments designed to cure the defects perceived by the court in *Bolton* v. *Harris*, *supra*, which eliminated any basis for the claim that a commitment rendered under Section 301(d) has a punitive aspect that requires that commitment to be terminated even though the petitioner remains dangerously insane.

Section 301(d) as an alternative means for civil commitment, rather than a sentencing option.

Petitioner's argument takes no account of the unique position of insanity acquittees. He assumes that he must be treated in all respects as a convicted criminal or in all respects as an ordinary civil committee, when in fact he is neither. The District of Columbia procedure for commitment of insanity acquittees provides a procedurally sound means of determining whether the criteria for commitment are satisfied. The differences between these procedures and those prescribed for civil committees are carefully designed to reflect the special position of an insanity acquittee, who has been permitted to escape the penal sanction on the basis of his showing by a preponderance of the evidence that he was afflicted with a dangerous mental illness. The Constitution requires no more.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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JULY 1982

APPENDIX

1. D.C. Code Ann. § 24-301 (1973) provides in pertinent part:

* * * * *

(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

(d) (1) If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e).

(2) A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel—

(A) in the case of a person who is eligible to have counsel appointed by the court, by continuing any appointment of counsel made to represent such person in the prior criminal action or by appointing new counsel; or

(B) in the case of a person who is not eligible to have counsel appointed by the

court, by assuring representation by retained counsel.

If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

(3) An appeal may be taken from an order entered under paragraph (2) to the court having jurisdiction to review final judgments of the court entering the order.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the

court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release

under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

* * * * *

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

(h) The provisions of this section shall supersede in the District of Columbia the provisions of any Federal statutes or parts thereof inconsistent with this section.

* * * * *

(j) Insanity shall not be a defense in any criminal proceeding in the United States District Court for the District of Columbia or in the Superior Court of the District of Columbia, unless the accused or his attorney in such proceeding, at the time the accused enters his plea of not guilty or within fifteen days thereafter or at such later time as the court may for good cause permit, files with the court and serves upon the prosecuting attorney written notice of his intention to rely on such defense. No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence.

(k)(1) A person in custody or conditionally released from custody, pursuant to the provisions of this section, claiming the right to be released from custody, the right to any change in the conditions of his release, or other relief concern-

ing his custody, may move the court having jurisdiction to order his release, to release him from custody, to change the conditions of his release, or to grant other relief.

(2) A motion for relief may be made at any time after a hearing has been held or waived pursuant to subsection (d) (2) of this section.

(3) Unless the motion and the files and records of the case conclusively show that the person is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. On all issues raised by his motion, the person shall have the burden of proof. If the court finds by a preponderance of the evidence that the person is entitled to his release from custody, either conditional or unconditional, a change in the conditions of his release, or other relief, the court shall enter such order as may appear appropriate.

(4) A court may entertain and determine the motion without requiring the production of the persons at the hearing.

(5) A court shall not be required to entertain a second or successive motion for relief under this section more often than once every six months. A court for good cause shown may in its discretion entertain such a motion more often than once every six months.

(6) An appeal may be taken from an order entered under this section to the court having jurisdiction to review final judgments of the court entering the order.

(7) An application for habeas corpus on behalf of a person who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court having jurisdiction to entertain a motion pursuant to this section, unless it also appears that the remedy by motion is inadequate or ineffective to test the validity of his detention.

2. The District of Columbia Hospitalization of the Mentally Ill Act of 1964, D.C. Code Ann. § 21-501 *et seq.* (1973), provides in pertinent part:

§ 21-545. Hearing and determination by court or jury; order; witnesses; jurors

(a) Upon the receipt by the court of a report [from the Commission on Mental Health reflecting a finding that an individual is dangerously mentally ill] the court shall promptly set the matter for hearing and shall cause a written notice of the time and place of the final hearing to be served personally upon the person with respect to whom the report was made and his attorney, together with notice that he has five days following the date on which he is so served within which to demand a jury trial. The demand may be made by the person or by anyone in his behalf. If a jury trial is demanded within the five-day period, it shall be accorded by the court with all reasonable speed. If a timely demand for jury trial is not made, the court shall determine the person's mental condition on the basis of the report of the Commission, or on such further evidence in addition to the report as the court requires.

(b) If the court or jury, as the case may be, finds that the person is not mentally ill, the court shall dismiss the petition and order his release. If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public. The Commission, or a member thereof, shall be competent and compellable witnesses at a hearing or jury trial held pursuant to this chapter. The jury to be used in any case where a jury trial is demanded under this chapter shall be impaneled, upon order of the court, from the jurors in attendance upon other branches of the court, who shall perform the services in addition to and as part of their duties in the court.

§ 21-546. Periodic requests for examination of hospitalized patient; procedure for examination and detention or release; petition to court

(a) A patient hospitalized pursuant to a court order obtained under section 21-545, or his attorney, legal guardian, spouse, parent, or other nearest adult relative, may, upon the expiration of 90 days following the order and not more frequently than every 6 months thereafter, request, in writing, the chief of service of the hospital in which the patient is hospitalized, to have a current examination of his mental condition made by one or more physicians. If the request is timely it shall be granted. The patient may,

at his own expense, have a duly qualified physician participate in the examination. In the case of such a patient who is indigent, the Department of Public Health shall, upon the written request of the patient, assist him in obtaining a duly qualified physician to participate in the examination in the patient's behalf. A physician so obtained by an indigent patient shall be compensated for his services out of any unobligated funds of Department of Public Health in an amount determined by it to be fair and reasonable. If the chief of service, after considering the reports of the physicians conducting the examination, determines that the patient is no longer mentally ill to the extent that he is likely to injure himself or other persons if not hospitalized, the chief of service shall order the immediate release of the patient. However, if the chief of service, after considering the reports, determines that the patient continues to be mentally ill to the extent that he is likely to injure himself or other persons if not hospitalized, but one or more of the physicians participating in the examination reports that the patient is not mentally ill to that extent, the patient may petition the court for an order directing his release. The petition shall be accompanied by the reports of the physicians who conducted the examination of the patient.

§ 21-547. Judicial determination of petition filed under section 21-546; order; physicians as witnesses

In considering a petition filed under section 21-546, the court shall consider the testimony

of the physicians who participated in the examination of the patient, and the reports of the physicians accompanying the petition. After considering the testimony and reports, the court shall either (1) reject the petition and order the continued hospitalization of the patient, or (2) order the chief of service to immediately release the patient. A physician participating in the examination shall be a competent and compellable witness at any trial or hearing held pursuant to this chapter.

§ 21-548. Periodic examinations by hospital authorities; release

The chief of service of a public or private hospital shall, as often as practicable, but not less often than every six months, examine or cause to be examined each patient admitted to a hospital pursuant to this subchapter and if he determines on the basis of the examination that the conditions which justified the involuntary hospitalization of the patient no longer exist, the chief of service shall immediately release the patient.

§ 21-549. Preservation of other rights to release

Sections 21-546 to 21-548 do not prohibit a person from exercising a right presently available to him for obtaining release from confinement, including the right to petition for a writ of habeas corpus.

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